

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5145-11T1

IN RE:

PRINCETON RAILROAD STATION
TRACK REMOVAL PROJECT,
PRINCETON RAILROAD STATION,
MERCER COUNTY, BOROUGH OF
PRINCETON.

Argued January 8, 2014 – Decided March 18, 2014

Before Judges Sapp-Peterson, Lihotz and
Maven.

On appeal from the New Jersey Department of
Environmental Protection.

Virginia Kerr argued the cause for
appellants Save the Dinky, Inc. and Anne
Neumann.

Cheryl R. Clarke, Deputy Attorney General,
argued the cause for respondent Department
of Environmental Protection (John J.
Hoffman, Acting Attorney General, attorney;
Andrea M. Silkowitz, Assistant Attorney
General, of counsel; Ms. Clarke, on the
brief).

Kenneth M. Worton, Deputy Attorney General,
argued the cause for respondent New Jersey
Transit Corporation (John J. Hoffman, Acting
Attorney General, attorney; Andrea M.
Silkowitz, Assistant Attorney General, of
counsel; Mr. Worton, on the brief).

Jonathan I. Epstein argued the cause for
Intervenor Trustees of Princeton University

(Drinker Biddle & Reath, LLP, attorneys; Mr. Epstein, Nicole A. Bayman and Karen A. Denys, on the brief).

PER CURIAM

The Princeton Railroad Station (Station) was built in the early Twentieth Century in the Collegiate Gothic architectural style, and is consistent with the nearby architecture of Princeton University (the University). On March 17, 1984, the Station was listed on the New Jersey Register of Historic Places as part of a thematic nomination of Operating Passenger Railroad Stations. The Station is located at the terminus of the Princeton Branch rail line, which runs approximately 2.9 miles between Princeton Junction and Princeton Borough. The line is locally known as the "Dinky."

Appellants, Save the Dinky, Inc. and Anne Neumann, seek judicial review of the May 11, 2012 final order of the New Jersey Department of Environmental Protection (DEP), issued through the Assistant Commissioner (Commissioner) who serves as the State Historic Preservation Officer,¹ permitting abandonment of New Jersey Transit's (NJT) transportation easement located adjacent to the Station. Appellants challenge the manner in

¹ "State Historic Preservation Officer" refers to "the Commissioner of the [DEP], who is designated by the Governor to administer the State Historic Preservation Program[.]" N.J.A.C. 7:4-1.3.

which the DEP carried out its responsibilities under the New Jersey Register of Historic Places Act of 1970, N.J.S.A. 13:1B-15.128 to -15.132 (Act).² They allege DEP failed to follow the regulations governing the review of the encroachment application. Appellants also contend DEP ignored federal law reserving exclusive jurisdiction over railway transportation applications to federal agencies, thus precluding State review of NJT's application. For the reasons that follow, we affirm the final agency decision.

I.

The following facts are pertinent to our review. On October 30, 1984, NJT entered into an agreement with the University for the sale and purchase of the Station, freight buildings, and adjacent property. The sales agreement was conditioned upon NJT retaining an easement over a portion of the property in order to continue the Dinky shuttle line, and the University providing commuter parking at the Station. The deed and sales agreement stipulated that those conditions would terminate five years after the abandonment of the easement and

² The Act established the New Jersey Register of Historic Places in the Division of Parks and Forestry, DEP, which consists "of a permanent record of areas, sites, structures and objects within the State determined to have significant historical, archeological, architectural or cultural value." N.J.S.A. 13:1B-15.128.

termination of passenger services to the Station, unless passenger services were reinstated during the five-year period.

Relevant to this appeal, Paragraph 15 of the sales agreement imposed the following conditions upon the University:

(b) Platform. Buyer agrees to provide and maintain a minimum of one hundred seventy (170) feet of station platform and a minimum width of twelve (12) feet and canopy for the length of the platform.

. . . .

(d) Terminus of the Rail Line. Buyer has the right to move the existing terminus of the rail line southward coincident with the location of the minimum reservation of platform space. This relocation, which will include moving the bumper block, rail removal, cutting and resecuring the catenary and signal relocation, must be done by Seller, its agents, or its designee, at the sole expense of Buyer.

Further, Paragraph 17 sets forth the following terms relating to passenger service operation:

Operation of Passenger Service. So long as Seller continues to operate passenger service to the Property, Seller will have the sole responsibility to maintain the track, roadbed and all other equipment . . . and shall have the following rights and obligations in connection therewith:

(a) Seller reserves the right of its employees, agents or designees to enter the station area in order to inspect, maintain, operate, install, move or remove railroad or

other passenger-related equipment, trackage or other property.

(b) Seller reserves the right, at its sole expense, to maintain and use the existing rail line and any associated catenary lines, signal equipment, poles, wire and cable lines.

(c) Seller reserves the right, subject to prior notification to Buyer, to expand, reduce, terminate or alter the type of passenger-related services within or serving the station parcel, if in its opinion, conditions warrant.

On October 15, 1996, the parties executed an amendment to the sales agreement, altering Paragraph 15a entitled, "Station Facilities." Pursuant to this amendment, to ensure continued transportation services, NJT agreed to vacate the northern building of the Station and relocate to the existing southern facility upon the completion of certain improvements by the University, and the receipt of a certificate of occupancy. All other terms, covenants, and conditions of the original agreement remained unchanged.

Thereafter, the University announced the development of its neighborhood Arts and Transit Center Project (ATC Project) in the area surrounding the Station. On October 21, 2010, the University notified NJT that it was exercising its right under the sales agreements to have NJT relocate the Dinky terminus 460 feet to the south. In response, NJT advised the University that

it had no objection to the move, as contemplated in the 1984 sales agreement.

On January 20, 2012, Dara Callender, NJT's Supervising Compliance Specialist, submitted an Application for Project Authorization (Project) under the Act to the DEP Historic Preservation Office³ (HPO). The application described the Project as consisting of

the abandonment of the current NJ TRANSIT easement at the University[-]owned Princeton Railroad Station for the continuation of rail service, the removal of all railroad related infrastructure for a length of 460 feet, and the establishment of a new terminus for the Princeton Branch railroad corridor at a location south of the present site, along with a new easement to provide access to that site for public transportation purposes.

On January 25, 2012, HPO Administrator Daniel Saunders notified NJT that the initial application was "technically and professionally complete and sufficient."⁴ The letter further indicated that HPO staff had determined, pursuant to N.J.A.C.

³ "Historic Preservation Office" refers to the office of the Division of Parks and Forestry, DEP "with the responsibility for maintaining the New Jersey Register of Historic Places and administering the State Historic Preservation Program." N.J.A.C. 7:4-1.3.

⁴ "Within 30 days of receipt of an application for project authorization, the Department shall review the application for technical and professional completeness and sufficiency and shall notify the applicant in writing as to whether or not the application is complete and sufficient." N.J.A.C. 7:4-7.2a.

7:4-7.4 of the Act, that the Project will encroach upon a registered historic property, the Station, because "the removal of railroad infrastructure and the abandonment of the easement will alter the character of the registered property." See N.J.A.C. 7:4-7.2c. The HPO scheduled the encroachment application for consideration by the Historic Sites Council (HSC), pursuant to N.J.A.C. 7:4-7.2(e)(3).⁵

In a letter to Saunders dated February 7, 2012, Callender clarified the intent of the application, expressing that NJT "seeks approval only for the agency's intended relocation of the easement from the section of track at the 460 foot long northern end of the Princeton Branch corridor to the new station area." (emphasis in original). She further emphasized that "[a]ll of the physical activities discussed in the project scope contained in the Application will be designed, constructed and financed by Princeton University after rail service at the existing station area has terminated and the NJ TRANSIT easement has been removed from the University property."

⁵ "Historic Sites Council" refers to the body within the Division of Parks and Forestry, DEP established by P.L. 1967, c.124, N.J.S.A. 13:1B-15.108 et seq. to, among other things, provide "advice on encroachments by the undertakings of State, county or municipal governments or any agency or instrumentality thereof on properties listed in the New Jersey Register." N.J.A.C. 7:4-1.3.

On February 9, 2012, NJT held a public open house to provide information about its role in the University's ATC Project. On February 16, and April 19, 2012, the HSC conducted public meetings on NJT's application in accordance with the Open Public Meetings Act, N.J.S.A. 10:4-6.

During the meetings, NJT presented its application, the University presented its proposed ATC Project, and appellants, members of the public, and elected officials from surrounding municipalities, voiced their opinions. At the start of the February 16 meeting, Saunders explained the nature of the application:

[NJT] proposes to cease its service to the existing railroad station and to stop that train service [460] feet to the south. Once they've ceased using the station, they are proposing to abandon that northern most piece of the easement that allows them to go up to the existing railroad building.

Saunders further explained to HSC that its review was limited to NJT's abandonment of the easement, and not the termination or relocation of its rail service. He addressed the novelty of this particular application:

We have never reviewed abandonment as an encroachment before. It's not been something the council has done So this is kind of an odd application to review because there's very little public action that we really have before us. Once [NJT] has chosen to stop the train at a different place, it leaves track that isn't being used

anymore and the council's purview is over the abandonment of the easement

In response to a council member's query seeking to clarify his understanding of the "reviewable action," Saunders explained further:

There's been some discussion of what the reviewable action is with staff What they're actually asking the council to do is for authorization to abandon that easement. If that in fact occurs, the . . . property will be fully owned with full rights by [the] University. [The] University will remove track, make modifications. [The] University, remember, is a private entity that is not subject to the [Act]. So it's a kind of a -- that's why it's an unusual review. It's limited to really the abandonment of the easement.

The HSC chairwoman, Sophia Jones, asked for clarification of precedent for reviewing an abandonment application. The following colloquy occurred:

[Jones]: [I]s it one of the points that there is no precedent for an abandonment being reviewed?

[Saunders]: No, there's a precedent for reviewing the easement [T]here's two distinct actions that Transit is undertaking. One is they can stop service. We don't have a review authority over them stopping service to a station. We do have a review authority over them then subsequently abandoning the transportation easement.

[Jones]: I understand we have review authority, but what about a precedent? You said there was no precedent for it.

[Saunders]: There's no precedent. It's not about the abandonment of the easement [T]here's no precedent for us to review the cessation of service.

[Jones]: But there is precedent for an abandonment review?

[Saunders]: The easement is clearly in the rules. If you read the definition of an encroachment, it's clearly there. Any relinquishment of rights is clearly reviewable undertaking.

After the hearings, the HSC debated the timing of NJT's application in light of pending litigation⁶ and the effect of the sales agreement's five-year easement termination clause, as well as the merits of the overall Project. The HSC was particularly concerned with the University's commitment to maintaining the spirit and integrity of the Station's historic designation, as well as the future use of the Station.

The HSC adopted Resolution No. 2012-341 (HSC Resolution), recommending approval of the Project. The resolution included findings of fact recognizing the historic designation of the

⁶ Appellant Save the Dinky and several individuals filed a lawsuit against the University and NJT concerning the interpretation of the 1984 sales agreement. MER-C-64-11. On December 23, 2013, Judge Paul Innes, P.J.Ch., granted defendants' motions for summary judgment, finding that "under the terms of the 1984 Sales Agreement as amended by the 1996 Agreement, [the] University is permitted to propose, and NJ Transit is permitted to approve, a plan to relocate the train station and rail terminus 460 feet south within the Dinky station property."

Station, and setting forth the basis for its recommendation. In relevant part, the HSC found:

4. The appropriate standard to evaluate this project is the Secretary of the Interior's Standard for the Treatment of Historic Buildings - Rehabilitation. "Rehabilitation is defined as the act or process of making possible a compatible use for a property through repair, alterations, and additions while preserving those portions or features which convey its historical, cultural, or architectural values."

5. The [HPO] has determined that, in accordance with N.J.A.C. 7:4-7.4, the proposed undertaking is an encroachment that will diminish the character and integrity of the registered property, the Princeton Railroad Station, because the project as currently proposed will result in abandonment of the easement and subsequent removal of track and infrastructure. The project as proposed violates Preservation Standard 4; the abandonment of the easement will lead to the alteration of the character of the registered property.

6. Specifically, the abandonment of the easement, as proposed, includes the following adverse impacts:

- Abandonment of the NJ Transit easement results in the permanent loss of the connection of the Princeton Railroad Station to track and railroad infrastructure.
- The Princeton Railroad Station will no longer function in its historic use as a terminal train station.
- NJ Transit will remove all rail related infrastructure, including track and

catenary, adjacent to the Princeton Railroad Station, for a length of 460'.

. . . .

11. Princeton University is not subject to review under the New Jersey Register of Historic Places Act.

12. Princeton University will construct a new NJ Transit train station for the Dinky line, south of the Princeton Railroad Station. NJ Transit will then relocate the rail terminus 460' south of the present location and establish a new transportation easement. The construction of a new station is part of a larger vision on the part of Princeton University to promote the arts through the creation of an Arts and Transit Center on the western edge of the campus that will be home to the new Lewis Center for the Arts. Incorporated into this plan are improvements to reduce traffic congestion.

[(Emphasis in the original).]

The recommended approval was subject to three conditions intended to minimize any adverse effects on the Station's historic designation:

(1) Prior to the abandonment of the easement, Historic American Building Survey (HABS) quality documentation shall be performed to record the current appearance of the Princeton Railroad Station complex and its physical setting

(2) NJ Transit shall promote public awareness of the history of the Princeton Railroad Station through the installation and permanent maintenance of interpretive displays at the Princeton Railroad Station and/or the new Dinky Station. These

displays shall use text and historic photographs to present the history of the station and the Princeton Branch, in particular, its relationship to both the township and the University.

(3) The track shall not be removed until the service is terminated and the connection work for the new track has commenced. NJ Transit will not abandon the easement until new transit service is in operation.

The HSC also included a non-binding recommendation that the University rehabilitate the Station in accordance with the standards for Historic Properties.

DEP Assistant Commissioner for Natural and Historic Resources Rich Boornazian reviewed the record and considered the HSC's recommendations. On May 11, 2012, Boornazian adopted the HSC Resolution, thereby authorizing the abandonment of 460 feet of the transportation easement. He noted the Act did not apply to the private actions of the University, but, nevertheless, indicated he would forward the non-binding recommendation to the University.

On June 25, 2012, appellants filed a notice of appeal. On September 6, 2013, we denied appellants' emergent application to stay the May 11, 2012 decision, but ordered an expedited appeal.

Appellants raise the following issues on appeal:

I. THE DEP HAS NO AUTHORITY TO AUTHORIZE AN ABANDONMENT OF A PUBLIC TRANSPORTATION EASEMENT.

II. THE ASSISTANT COMMISSIONER ACTED UNREASONABLY IN RESOLVING THE ISSUE OF FEDERAL PERMITTING REQUIREMENTS BASED ON INACCURATE INFORMATION ABOUT THE STATUS OF THE PRINCETON BRANCH LINE.

III. THE ASSISTANT COMMISSIONER IMPROPERLY APPROVED AN ENCROACHMENT REQUEST THAT REQUIRED IT TO DETERMINE DISPUTED CONTRACT ISSUES THAT ARE THE SUBJECT OF PENDING LITIGATION.

IV. THE ASSISTANT COMMISSIONER FAILED TO FOLLOW THE REGULATIONS THAT GOVERN REVIEW OF AN ENCROACHMENT APPLICATION.

V. THE ASSISTANT COMMISSIONER ERRED IN APPROVING AN ENCROACHMENT APPLICATION ON THE BASIS OF A NOVEL "LAST CLEAR CHANCE DOCTRINE."

VI. APPELLANTS' PROCEDURAL DUE PROCESS RIGHTS WERE VIOLATED.

A. The Notice of the HSC Meetings Was Not Legally Sufficient.

B. The Assistant Commissioner Abused His Discretion By Failing to Hold a Hearing.

We have considered appellants' arguments in light of the record, briefs submitted, and applicable legal principles. The issues raised in Points III, V, and VI are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(D) and (E). For the reasons that follow, we reject the remaining contentions and affirm the final agency decision.

II.

Our review of a final administrative agency decision is limited. We will not reverse an agency's decision unless it is arbitrary, capricious, or unreasonable, or lacks fair support in the record. In re Herrmann, 192 N.J. 19, 27-28 (2007). "Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is valid when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Beattystown Cmty. Council v. Dep't of Env'tl. Prot., 313 N.J. Super. 236, 248 (App. Div. 1998)(quoting Worthington v. Fauver, 88 N.J. 183, 204-05 (1982)). The purpose of our review is to determine whether the agency decision violates legislative policies, lacks the support of substantial evidence in the record, and unreasonably applies legislative policies to the relevant facts. Herrmann, supra, 192 N.J. at 28. If the agency meets these criteria, we owe substantial deference to its expertise and superior knowledge in a particular field, as well as to its interpretation of its own regulations. Ibid.

III.

We begin by reviewing the statutory and regulatory provisions governing the review of NJT's application. Pursuant to the Act, the Commissioner has an obligation to review the application submitted by a State governmental entity for an undertaking or "an action . . . which has the potential to result in direct or indirect effects on any [registered historic] structure." N.J.S.A. 13:1B-15.131. In analyzing such an application, the Commissioner, through the HPO, must first determine whether the undertaking constitutes an encroachment.

N.J.A.C. 7:4-7.2e. An "encroachment" means

the adverse effect upon any district, site, building, structure or object included in the New Jersey Register resulting from the undertaking of a project by the State, a county, municipality or an agency or instrumentality thereof, as determined by application of the Criteria for Determining Whether an Undertaking Constitutes an Encroachment set forth in N.J.A.C. 7:4-7.2(e)(4) and the Secretary of the Interior's Standards for the Treatment of Historic Properties (36 C.F.R. § 68) and "Guidelines for Preserving, Rehabilitating, Restoring, and Reconstructing Historic Buildings[.]"^[7]

⁷ Standards for the Treatment of Historic Properties (36 C.F.R. § 68) and Guidelines for Preserving, Rehabilitating, Restoring, and Reconstructing Historic Buildings, issued by the National Park Service (NPS) (collectively the Standards), define "rehabilitation" as "the need to alter or add to a historic property to meet continuing or changing uses while retaining the property's historic character." Rehabilitating, Standards for
(continued)

[N.J.A.C. 7:4-1.3.]

Assuming an encroachment has been identified, the regulations then require the HSC to consider:

- i. The public benefit of the proposed undertaking;
- ii. Whether or not feasible and prudent alternatives to the encroachment exist; and
- iii. Whether or not sufficient measures could be taken to avoid, reduce or mitigate the encroachment.

[N.J.A.C. 7:4-7.2(e)(4).]

Here, Saunders determined that NJT's proposed undertaking was an encroachment on the Station, which will diminish the character and integrity of the registered property. Saunders advised the HSC that rehabilitation was the applicable standard to be applied to evaluate the NJT application, as it would allow for the "process of making a compatible use for a property through repair, alterations and additions while preserving those portions or features which convey its historic, cultural or architectural values." 36 C.F.R. § 68.

(continued)

Rehabilitation and Guidelines for Rehabilitating Historic Buildings,
http://www.nps.gov/hps/tps/standguide/rehab/rehab_index.htm
(last visited Mar. 7, 2014).

The HSC also determined the relocation of the easement from the current north terminal, resulting in the loss of the traditional function of the Station, constitutes an encroachment. The HSC recognized the benefits accruing to the public were the development of a "new train station for the Dinky line" only 460 feet from the current location, "improvements to reduce traffic congestion," and the "installation and permanent maintenance of interpretative displays at the Station" to "promote public awareness of the history of the [] Station." The council members recognized there were limited alternatives to the undertaking given the terms of the 1984 sales agreement and 1996 amendment anticipating NJT's relocation of the easement. Nevertheless, the record demonstrates the HSC understood its role to preserve the State's historic registered property, N.J.S.A. 13:1B-15.110, and its obligation to propose practical recommendations to mitigate the encroachment on the Station. N.J.A.C. 7:4-7.2(e)(4). In that regard, the HSC proposed specific conditions to preserve the history of the Station for posterity.

IV.

We turn now to appellants' claims of error. They contend the HSC did not appropriately evaluate the encroachment application using the criteria set forth in N.J.A.C. 7:4-7.2.

Specifically, they argue the Assistant Commissioner failed to (1) determine the public benefit, (2) decide whether feasible and prudent alternatives existed, and (3) establish whether measures could be taken to minimize the harm caused by the encroachment. We disagree.

The record demonstrates that the HSC held two open public meetings, then vigorously discussed the merits of the application in light of the issues raised by the parties and the public. The HSC approved a resolution in which it made findings of fact, including its determination that the Project benefits the public, and imposed conditions to mitigate any adverse effects. The Assistant Commissioner thereafter adopted the HSC Resolution authorizing the abandonment of the easement. Under the circumstances of this particular application, and in light of Saunder's caveat with respect to the uniqueness of this application, we discern no improprieties in the manner in which the HSC discharged its duties. Furthermore, we conclude the Assistant Commissioner did not act arbitrarily when adopting the HSC Resolution.

Appellants next contend DEP lacked the authority to authorize the abandonment of the transportation easement. Although appellants do not cite any authority for this claim, it is clear from the Act that DEP, through the HPO, has the

obligation to review and authorize any project undertaken by a State agency or municipality, which will encroach upon a registered property. N.J.S.A. 13:1B-15.131.

As previously noted, the NJT application calls for the abandonment of the public transportation easement, which would "alter the character" of the Station. Because this undertaking inherently creates an encroachment on a historic site, it must first be reviewed by way of application to the HPO. DEP, through its Division of Parks & Forestry, has express authority to act on this application. See N.J.S.A. 13:1B-15.105.

Appellants further contend DEP's decision should be reversed because the Commissioner lacked jurisdiction to address the abandonment of the easement. Appellants argue the federal Surface Transportation Board (STB) has exclusive jurisdiction over requests by regulated rail carriers to abandon or discontinue use of existing rail lines. See 49 U.S.C.S. § 10903; see also Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd., 252 F.3d 246, 251 (3d Cir. 2001) ("A rail carrier intending to abandon, and to be released from its obligations to retain or operate, any part of its railroad lines must file an application to do so with the STB and such abandonment must adhere to certain established procedures.").

In general, the STB has authority over rail carriers regarding operational changes to railroad tracks and station facilities, even when operated solely within a single state. See 49 U.S.C.S. § 10501. Further,

[t]he STB is empowered to exempt a transaction from the ordinary regulatory requirements if the STB finds that the ordinary procedures are not necessary to carry out federal transportation policy and that either the transaction is limited in scope or the full application procedures are not necessary to protect shippers from any abuses of market power.

[Friends, supra, 252 F.3d at 251.]

The STB reviews a proposed abandonment of a rail service to determine if an exemption is warranted. See 49 C.F.R. § 1152.50b.

We cannot dispute that NJT's end plan to relocate the Dinky shuttle line to another terminal facility is inherently a transportation function. However, in its application before the HSC, NJT did not seek "to be released from its obligation to retain or operate its railroad line." Rather, it sought to abandon the easement adjacent to the present Station and relocate it 460 feet to the southern facility. We take no position on whether this action requires federal intervention. We note only that, as submitted to the HSC, the plans presented

by NJT demonstrate its intent to continue providing the Dinky service, but to a nearby terminal.

As with any large scale development project, the HSC is clearly one of several requisite governmental entities with review or approval authority over some aspect of the University's ATC Project. However, appellant's claim that federal transportation review is required for NJT's proposed actions vis-à-vis their rail service is not necessarily incorrect, but rather misplaced in the context of this application. According to Saunders, the DEP Commissioner, as the State Historic Preservation Officer, becomes involved in certain actions undertaken by the STB, and when appropriate, reviews applications brought under Section 106 of the National Historic Preservation Act (NHPA).⁸ In response to comments on this topic, Saunders stated:

⁸ Section 106 of the NHPA provides as follows:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.

(continued)

A couple things that were brought up by the audience that I want to just quickly address, one was the idea that there needs to be [a] federal review at the [STB]. So far the [STB] has not claimed jurisdiction here. If they do there'll be a federal review on a separate path considering some of the same kinds of things because there'll be a [Section] 106 review if there is, Section 106 of the National Historical Preservation Act. But that's a separate process that can happen if the [STB] claims jurisdiction.

We presume that if federal review by the STB is required for any phase of this Project, it will do so in accordance with its procedures and standards for review.

As to the matter at hand, we are satisfied by the record that NJT appeared before the HSC, and ultimately the DEP, solely to seek authorization to abandon the easement adjacent to the Station because such action would encroach upon, and change the nature of, that registered historic site. Thus, we reject appellants' contention that the STB regulations and procedures are exclusive, or in some way preclude DEP's authority to act on this application. The record clearly demonstrates DEP did not exceed its authority, and acted appropriately while performing its statutory duty with respect to its review of the Project application.

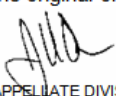
(continued)

[(16 U.S.C. § 470f) (emphasis added).]

In sum, we conclude that the HSC review of the application was consistent with the language and purpose of the Act and its regulations. The Assistant Commissioner's decision adopting the HSC Resolution was neither arbitrary, capricious nor unreasonable, as it was fully supported by the record.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION