

SUPREME COURT OF NEW JERSEY

NO: 07-4197

IN RE: : ON PETITION FOR CERTIFICATION
: OF THE FINAL ORDER OF THE
: SUPERIOR COURT OF NEW JERSEY
PRINCETON RAILROAD STATION : APPELLATE DIVISION DOCKET NO.:
TRACK REMOVAL PROJECT, : A-5145-11T1
PRINCETON RAILROAD STATION, :
MERCER COUNTY, BOROUGH OF : Civil Action
PRINCETON. :
:
: SAT BELOW:
: HON. Maven, Sapp-Peterson, and
: Lihotz, JJ.A.D.
:
:
:

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Respondents and the intervenor do not respond meaningfully to the issues raised in the petition. Instead, they belittle and mischaracterize petitioners' arguments and introduce irrelevant material in an attempt to distract from the significance of the case. The Court should accept review to make it clear that a state agency cannot use private contractual arrangements to circumvent protections in place since 1970 to protect New Jersey's historic resources from unjustified loss or destruction.

I. THE RELIANCE ON PRIVATE CONTRACTUAL ARRANGEMENTS TO OVERRIDE HISTORIC SITES REGULATION IS UNPRECEDENTED AND ABERRANT

Respondents and the intervenor argue that this case involves seemingly unimportant "unique circumstances" with no statewide significance. However, the circumstances are highly significant because they involve an unprecedented reliance on alleged private contractual rights to override the protections for historic sites established by the Register of Historic Places Act (the "Act"), N.J.S.A.13:1B-15.128 et seq. and attendant regulations, N.J.A.C.7:4-1.1 et seq.

The Act was passed in 1970 out of the recognition that sites significant to New Jersey's heritage were rapidly disappearing under development pressure and that state entities

have a special responsibility to act as careful stewards of sites under their control. In over forty years of experience, encroachment approvals under the Act have been based on a careful weighing of the public purpose of the project against the damage to the historic site and the availability of alternatives that would inflict lesser damage. E.g., In re Application of North Jersey District Water Supply Commission, 175 N.J. Super. 167, 203, certif. den. 85 N.J. 460 (1980) (encroachment through reduction in flow to Paterson Great Falls justified by dam project that responded to water supply crisis); Beattystown Community Council v. Dep't of Environmental Protection, 313 N.J. Super. 236 (App. Div. 1998) (minor encroachment on historic district justified by clear need for traffic safety improvements and absence of feasible alternatives); In Re Project Authorization Gateway Office Park, 408 N.J. Super. 540 (App. Div. 2009), certif den. 201 N.J. 14 (2010) (planned demolition of historic Sears building justified by redevelopment project to bring jobs to Camden and by prohibitive cost of remediating building).

In this case there was no such careful weighing. Instead, a project with devastating consequences for an operating historic railroad station was approved on the basis of a 1984 sale contract that allegedly gave a private entity, Princeton University, the right to require NJ Transit to abandon the

station so that the university could redevelop the station site and valuable associated property without any need to follow preservation standards in its development plans.

Petitioners are not claiming (as the Respondents falsely assert) that the nomination mandates perpetual railroad use. At issue here is the quality of the review process that is required when state agencies advocate for a project that will damage or destroy a historic site. The University attempts to portray the project as of no consequence by claiming that the thematic nomination of the Princeton Railroad Station contemplated "adaptive reuse of the nominated buildings in private hands." (PUB7)¹ Similarly, the DEP claims that the purpose of the nomination was not "to support operating railway services but to allow [the stations] to be used for other purposes in order to prevent their demise." (DEPb6) However, from a preservation viewpoint, no amount of creative reinterpretation can overcome the fact that the Dinky Station was given historic site protection not simply because of the historic buildings but because it still served its historic function as an operating terminal passenger station. The railroad infrastructure

¹ "PUB__" refers to intervenor Princeton University's brief in opposition to Certification; "DEPb__" refers to respondent Department of Environmental Protection's brief in opposition to Certification; "Aa_" refers to Appellants Appendix; "1T:_" and "2T:_" refer to the February 16 and April 19, 2012 HSC meeting transcripts. "ADop__" refers to the Appellate Division opinion.

features, including the high-raised platform, the 17-bay canopy, the catenary, and the tracks, were integral defining elements of the station complex. (HSC Resolution #2012-341, ¶¶1, 5, 6; Nomination Site Plans, Aa121, Aa122. It is ludicrous to suggest that the nomination contemplated that NJ Transit would sell the property just a few months later on terms said to have anticipated the buyer's eventual plans to destroy the operating station and redevelop the station buildings with no need to observe preservation requirements. As is plain from the questions raised by the Historic Sites Council (HSC), those requirements could or should have called for preservation of key defining features such as the historically significant high-raised platform, the canopy, and the trackbed, as well as adaptive reuse of the station buildings that would preserve the exterior façade and footprints. (1T34:7-35; 1T35:16-25; 1T62:17-63:1; 2T69:2-10; 2T70:6-22; 2T26:15-27:15). Yet the DEP review was structured to avoid examination of site plans and imposed no preservation constraints.

Under the Register Act, governmental action that will have an effect on a registered site is a reviewable undertaking.² NJ

² DEP regulations define an "undertaking" as an action that has the "potential to result in direct or indirect effects" on a listed historic site. An action is considered to have an "effect" whenever the action "causes or may cause any change, beneficial or adverse," in the character-defining features of the site. N.J.A.C.7:4-1.3.

Transit's decision to relocate the Dinky terminus and to terminate service to the Station would have been a reviewable action even if based on transportation policy considerations because such action would have an effect on the station by altering its context. Here, however, NJT acted to accommodate a private entity's development priorities and thus avoided accountability by relying on a private agreement.

If a state agency can sell historic property to a private entity in violation of DEP regulations defining sales as undertakings that require SHPO approval and then persuade the DEP that the sale agreement allowed the entity to redevelop the site on its own terms, it is hard to imagine what circumstances do have historic preservation implications. Remarkably, respondent DEP nevertheless asks this Court to believe that this case has no preservation implications (DEPb4).

II. CONTRARY TO THE INTERVENORS' CLAIM, THE DEP ENCROACHMENT APPROVAL WAS SQUARELY FOUNDED ON NJ TRANSIT'S ALLEGED CONTRACT OBLIGATIONS

The legal rationale that underlies the DEP approval bears repeating. NJ Transit based its encroachment application squarely on its alleged contract obligations. (Aa12a, 21a, 23a-47a; 1T16:5-6; 1T69:10-22).³ NJ Transit told the HSC it was

³ The centrality of the contract was stressed by NJ Transit's Regional Manager Tom Clark in a response to an HSC member who

relocating the Princeton Branch station stop because the 1984 agreement gave the University the "legal right to move the terminus of the station." [1T69:10-22]. The Historic Sites Council (HSC) was repeatedly advised that its options were limited given the contract obligations. (E.g., 1T11:3-12; 2T92:2-24; 2T93:16-25).

With the terminus move, NJ Transit would cease service to the station. According to NJ Transit, under the easement termination clause in the contract and deed (Aa38; Aa41), that cessation would constitute an "abandonment and termination of passenger services to the property" that would obligate NJ Transit to relinquish its public transportation easement in five years. (A21a, "Alternatives/Mitigation") The University would then be free to redevelop the property without any need to answer to historic sites regulators. (Id.) NJ Transit argued that under the contract there was no alternative to the inevitable termination of the easement (Id.) and that that

asked why NJ Transit was proceeding with a project opposed by the former Princeton Borough. He stated: [W]hy are we moving this? I think it's been stated numerous times that there's a legal obligation here. There's been a contract that has been in place since 1984 which gives the university the legal right to move the terminus of the station. We have been working with them in that regards. This contract has been reviewed by the deputy attorney general's office and has agreed with the contract that we do, and the university does have the right to relocate the station. It also has been reviewed by the senior management of New Jersey Transit, and we are all in agreement with what the contract says. So that's why we're moving it. [1T69:10-22]

permission to prematurely terminate it would benefit the public by allowing the University to begin its redevelopment work right away, rather than allowing the station buildings to be idle. Thus, the DEP was persuaded to grant an encroachment approval (premature easement termination) even though the private buyer would not be required to follow federal preservation standards.

The Appellate Division likewise recognized the significance of the contract terms to the HSC's view of its "limited options" in evaluating the encroachment application. (ADop18) Even respondent DEP's submission acknowledges that the 1984 contract was a key "special circumstance" in this case. (DEPb3-4).

In view of the clear record in this regard, the Court should reject the University's position that the DEP ruling at issue is not founded on the 1984 sale contract. (Pub13).

III. THE CHANCERY OPINION REFUTES NJ TRANSIT'S VIEW OF ITS CONTRACT OBLIGATIONS AND SHOULD HAVE PROMPTED THE APPELLATE DIVISION TO REVERSE THE DEP APPROVAL

The December 23, 2013 opinion in the Chancery Division case demonstrates that NJ Transit was simply wrong about the key legal claims that were the basis of its encroachment application. Judge Innes found that the 1984 contract did not give Princeton University the unilateral right to compel NJ Transit to move the station terminus; rather, he found that under the contract NJ Transit retained full discretion over

decisions about the location of the terminus. Judge Innes also held that the proposed 460-foot move and consequent cessation of service to the Dinky station would not trigger an automatic expiration of NJ Transit's public transportation easement in five years because there would not be an abandonment of service to the property covered by the easement.

The Appellate Division's failure to take the Chancery ruling into account is inexplicable. Even SHPO Officer Saunders, who had urged the HSC to defer to NJ Transit's view of its legal obligations, advised the HSC that if NJ Transit was wrong about those obligations, there would have to be a new agreement with appropriate review under the Register Act. (2T4:12-24) Also inexplicable is the failure by the DEP and NJ Transit, in opposition to the Petition, to acknowledge that a court with concomitant jurisdiction over this matter had evaluated and rejected this interpretation of the contract. Instead, the DEP simply recites once again the claim that under the 1984 contract terms the easement would expire after a 460 foot relocation. (DEPb4)

The intervenor does acknowledge the Chancery opinion but attempts to discount Judge Innes' interpretations as "*dicta* - nothing more." (Pub16) However, Judge Innes' finding that the University did not have the right to compel a terminus relocation and his view that in any event the 460' move

southward would not cause the easement to expire in five years - whether or not dicta - represented the considered opinion of a court with expertise in contract interpretation. The HSC and DEP did not have that expertise and should never have taken the unprecedented step of approving the Princeton Branch track removal project on the basis of a contested a contract which was later interpreted not to provide essential support for the project.

IV. THIS COURT SHOULD ACCEPT REVIEW TO
CLARIFY THAT THE JURISDICTION OF THE
REGISTER ACT CANNOT BE CIRCUMVENTED
THROUGH PRIVATE CONTRACTS

Respondents and the intervenor have argued throughout that the DEP has no authority to review NJ Transit's decision to terminate its railway service to the Dinky Station. However, this argument is irrelevant to the concerns raised by Petitioners. Plainly, if NJ Transit were to decide to discontinue the Dinky service because it proved economically unfeasible, the Register Act would not require it to continue the railroad service. In this case, however, by promoting the idea that it had no choice under the terms of its 1984 contract, NJ Transit was able to avoid meaningful review of a terminus relocation made to accommodate private ends of Princeton University having nothing to do with public transportation needs. As a result, the public interest in preservation was

improperly compromised and the DEP approved a project that would decimate a station in pristine condition that still served its historic purpose.

CONCLUSION

For all the reasons set forth in petitioner's Brief and this Reply Brief, this case presents a question of general public importance with respect to historic preservation that should be settled by this Court for the benefit of the DEP, all state agencies, the courts, and the public at large.

May 16, 2014

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CERTIFICATION OF SERVICE AND FILING

I certify that the Original and three copies of the within Petitioner's Reply Brief has been caused today to be filed with the Clerk of the Supreme Court of New Jersey via overnight delivery, and that copies of the within Petition have been served on Kenneth M. Worton, Esq., attorney for Respondent New Jersey Transit Corporation, Jonathan I. Epstein, Esq., attorney for Respondent Princeton University, and Cheryl R. Clarke, Esq., attorney for Respondent Department of Environmental Protection, via overnight delivery.

I certify that the foregoing statements by me are true. I am aware that if any of these statements are willfully false, I am subject to punishment.

May 16, 2014

Philip Rosenbach, Esq.