

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.
:
:
:

PETITION FOR CERTIFICATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. PRELIMINARY STATEMENT 1

II. QUESTIONS PRESENTED 2

III. STATEMENT OF THE MATTER INVOLVED 2

IV. ERRORS COMPLAINED OF 11

V. REASONS WHY CERTIFICATION SHOULD BE ALLOWED 15

VI. COMMENTS WITH RESPECT TO APPELLATE DIVISION OPINION 16

ANNEXED DOCUMENTS

NOTICE OF PETITION FOR CERTIFICATION A

WRITTEN OPINION OF APPELLATE DIVISION B

TABLE OF AUTHORITIES

CASES:

In re Application of North Jersey District Water Supply, 175 N.J. Super. 167, certif. den. 85 N.J. 460 (1980) 10

Beattystown Cmty. Council v. Dep't of Env't'l Prot., 313 N.J. Super. 236 (App. Div. 1998) 13

In re Project Authorization under the New Jersey Register of Historic Places Act, 408 N.J. Super. 540 (App. Div. 2009), certif. den. 201 N.J. 154 (2010) 13

Riverside General v. NJ Hosp. Rate Setting Com'n., 98 N.J. 458 (1984) 14-15

Swede v. Clifton, 22 N.J. 303 (1956) 14-15

STATUTES:

N.J.S.A.13:1B-15.128 et seq 1

N.J.S.A.27:25-1 7

ADMINISTRATIVE REGULATIONS:

N.J.A.C.7:4-7.4 3, 8, 13

N.J.A.C.7:4-7.2(e) (3) 3, 8

N.J.A.C.7:4-1.3 11

N.J. Register 7:4-1.3, p. 4-3 (Supp. 7-17-80) 11

N.J. Register 7:4-4.1 - 4.4.3 (Supp. 7-17-80) 11

I. PRELIMINARY STATEMENT

This Petition requests that the Court address significant issues under the Register of Historic Places Act of 1970, N.J.S.A. 13:1B-15.128 et seq. (the "Act" or the "Register Act"). The Act established an administrative process to protect the State's historic resources under public ownership from unjustified loss or destruction. This Court has never addressed the regulatory framework and the standards that guide the Commissioner's discretion.

This case presents compelling reasons for the Court to speak to that framework because it involves a radical departure from DEP regulations and existing precedent holding that encroachments on historic sites must be justified by both a public purpose that outweighs the damage to the historic resource and a showing that there are no alternatives to the project design that requires the encroachment. These issues arise in the context of a 2012 encroachment application made by New Jersey Transit Corporation (NJT) designed around plans of Princeton University that have had an indisputably destructive impact on the historic Princeton ("Dinky") Branch Railroad Station. NJT claims that it was obligated by a 1984 contract with the University to bring this application and also claims that as result of this same contract, the Act does not protect the historic station because the destructive actions will be taken by the University instead of

NJT. The same issues can arise in the context of any State agency that makes private contractual arrangements involving a registered historic property or with any encroachment application that presents an extraordinarily narrow framework for review.

II. QUESTIONS PRESENTED

1. Can a State agency covered by the New Jersey Register of Historic Places Act of 1970 prevent meaningful review of an encroachment application by relying on a sale contract with a non-covered private party that conveys the registered historic site and gives control over the future preservation of the site to the non-covered party?
2. Can the DEP properly grant encroachment authorization where the moving agency's states that the application has been brought for the benefit of and at the behest of a private party, and where the record on the encroachment application fails to show a public benefit or that any alternatives to encroachment were considered?

III. STATEMENT OF THE MATTER INVOLVED

A. Procedural Summary and Related Litigation

This proceeding began on January 20, 2012, when NJT submitted an Application for Project Authorization called the "Princeton Branch Track Removal Project" under the Register Act to the Historic Preservation Office (HPO) within the Department of Environmental Protection. HPO determined pursuant to

N.J.A.C.7:4-7.4 that the application would encroach upon the registered historic Princeton Railway Station and scheduled an encroachment application for consideration by the Historic Sites Council (HSC) pursuant to N.J.A.C.7:4-7.2(e)(3).

On April 19, 2012, the HSC adopted a Resolution approving the application subject to certain conditions. This Resolution was adopted by a May 11, 2012 final order issued by an Assistant Commissioner of the Department of Environmental Protection. (A83a-92a, A93a-A99a).¹

On June 25, 2012 Petitioners timely appealed this final order. The Trustees of Princeton University were granted leave to intervene in the appeal.

In August 2013 petitioners unsuccessfully applied for a stay of NJT's planned actions to end service to the historic Princeton Station, to institute service at a temporary station stop 1,200 feet to the south (a plan that had not been part of the project as described to the HSC), and to then remove track and take other actions that would damage the station. Since then the project has proceeded.

In January 2014, shortly before this case was argued in the Appellate Division, the Honorable Paul Innes issued a ruling in

¹ This Petition refers to Petitioners' Appellant Appendix using the following notation: A_a. It will refer to the transcripts of the HSC proceedings as follows: February 16, 2012: 1T; April 19, 2012: 2T.

related Chancery litigation involving a 1984 contract between NJT and the University that formed the legal basis for NJT's encroachment application. This ruling, contrary to NJT's position, determines that the contract did not give the University the unilateral right to relocate the station stop, and that instead NJT had the power to say "yes" or "no" to a request to relocate or otherwise alter the Princeton Station. The appellate record was supplemented with this opinion. Nevertheless, in an unpublished opinion dated March 25, 2014, the Appellate Division affirmed the May 11, 2012 DEP final order. Petitioners filed a timely Notice of Certification on April 7, 2014.

The status of related litigation requires mention. First, the plaintiffs and the University have both appealed Judge Innes's ruling. This case is pending as Docket No. A-002574-13. Second, the petitioners with the New Jersey Association of Railroad Passengers have appealed a June 2012 ruling by the NJT Board that authorized property transfers to the University, including the public transportation easement at issue on the present litigation. The appeal is pending as I/M/O Princeton Branch Railway Station-Property Interest Transfers with Princeton University, Docket No. A-006009-12.

B. The Significance of the Princeton "Dinky" Station

As the procedural history and public comment on NJT's encroachment application demonstrate, NJT's acquiescence to a Princeton University project that would end the life of a well-functioning, in-town historic operating station has been controversial for three basic reasons. First, the Princeton Branch Station has long been a beloved community resource. The Station was constructed in 1918 and serves a 2.7 mile terminal branch railroad line, popularly known as the "Dinky" line, that connects Princeton to Princeton Junction and points beyond on the Northeast corridor. (A10a, Petitioner's Appellate Brief, p. 7). The branch line itself dates back to 1865. (A10a). The station complex was designed by a noted railroad architect in a collegiate gothic style and consists of a 340-foot high-raised platform with a passenger building on the north and a freight building on the south connected by a 17-bay canopy.² (A10-11a, A20a, A121a, A125a). Over the years, the Princeton line has accumulated a rich history of literary and cultural association. (A242a; A212a). Many well-known cultural, intellectual, and political persons have taken the Dinky. (A242a).

² This discussion will refer to the elements of the station complex in the present tense even though site conditions have changed. NJT and the University have advised petitioners and the Appellate Division of an agreement that obligates the University to restore NJT's facilities and parking on the Princeton Station property should it be determined that NJT acted unlawfully in relocating the station.

Second, it is because of its transportation function that the Princeton Branch Station was designated as an historic site. The Station was listed on the New Jersey Register in March 1984 as part of a thematic nomination of "Operating Passenger Railroad Stations." (A100a-134a). The nomination described the station as significant because it is a terminal station with an early and unusual high-raised platform "in virtually original condition" that "continues to serve large numbers of commuters." (A115a). In 2012, when NJT sought DEP encroachment approval, the station still served large numbers of commuters and was ranked in the top third of NJT's boarding stations statewide, providing 15% of the ridership of the Princeton Junction service. (2T11:23-12:3; A177a).

Third, NJT agreed to the University's private development plans with catastrophic consequences for the Princeton Station through a completely private process. NJT has blatantly evaded its regulatory obligations under the Register Act and has avoided any public hearing process that would require it to demonstrate that the plan to relocate the station stop and prematurely relinquish public rights securing its transportation function serves the public interest.

C. The Encroachment and the Encroachment Application

NJT was created in 1979 by the New Jersey Public Transportation Act to acquire, operate, and contract for

transportation service in the public interest. N.J.S.A.27:25-1. In 1984, after the Princeton Station was listed on the State Register of Historic Places, NJT succeeded to ownership of the line.

In October 1984, NJT contracted to sell 3.465 acres of the Princeton Branch property, including the historic station complex, to Princeton University. (A23a-38a; A173a). The sale included all structures, but NJT retained ownership of all fixtures on the property related to the physical operation of the train. (A24a).

Under the 1984 agreement NJT reserved an easement that preserved NJT's exclusive right to use the entire property for public transportation purposes. (A38a). This easement was to remain in existence until five years "after the abandonment and termination of passenger services to the property, unless passenger services are reinstated during the five-year period." (A38a). The easement also preserved NJT's right to approve improvements thereby presumably providing additional protection for preservation of the site's historic features. (A38a).

D. The HSC Proceedings

In 2006 Princeton University announced a proposal to build an "Arts and Transit" project in the vicinity of the Dinky Station. (A12a). The "transit" aspect of the project included converting the functioning Dinky station into a restaurant and

café and replacing the station with a new station farther away from town. (A12a).

In January 2012 NJT applied to the New Jersey Historic Protection Office (SHPO) for authorization under the Register Act for a project it called the "Princeton Branch Track Removal Project." (A2a-61a). The Application explained that the project was undertaken at the request of Princeton University to facilitate the construction and staging of its arts campus. (A21a). NJT stated that under the terms of a 1984 agreement with the University NJT was obligated to relocate the terminus and that premature abandonment of the easement would allow the University to begin its alterations on the Princeton Station as soon as the new station opened. (A12a, A21a). NJT described the project as consisting of "the abandonment of the NJ Transit easement at the Princeton Railroad Station, 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."(A1a).

After the DEP Historic Preservation Office concluded pursuant to N.J.A.C.7:4-7.4 that the proposed project would encroach upon the registered historic Dinky Station³ and

³ Encroachment is defined in N.J.A.C.7:4-7.2e as 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 ... or an agency or

scheduled the application for consideration by the HSC pursuant to N.J.A.C.7:4-7.2(e)(3), in February 2012 NJT modified the Application to state that it sought approval only "for the agency's intended relocation of the easement from the section of track at the 460 feet long northern end of the Princeton branch corridor to the new station area." (A70a). By redefining the application, NJT was telling HSC to exclude the track removal and the adaptive reuse plans from the encroachment review and instead to treat NJT's agreement to abandon the easement as the only reviewable public action.

NJT's primary documentation for its application consisted of materials it relied upon for its position that it was legally obligated to relocate the terminus: the 1984 Agreement, the Deed, and a 1996 contract amendment. (A21a-61a). The NJT application did not include site plans, proposed agreements, or plans clearly showing the locations of the existing station, the proposed new station, or the 460 feet of easement to be abandoned. (A21a-61a).

Since NJT's application stated directly that its purpose was to facilitate construction and staging for the implementation of the University's planned Arts and Transit Project, there can be no dispute that the primary purpose of the application was to serve the development goals of a private entity. NJT claimed instrumentality thereof" as determined by application of specified criteria in the Administrative Code section.

that the project would provide significant incidental public benefits including allegedly improved facilities for transit users, among them better access for bus services. (A21a). Yet NJT's Application included no objective evidence that these alleged public benefits would outweigh the loss of an historic in-town terminal train station with convenient access from a public street.

The HSC considered the Application at two meetings in February and April 2012 under a constrained time frame that limited each public comment to three minutes. (A73a; A83a). Public commenters at the initial February 2012 meeting and at a second meeting in April 2012, including elected officials from the former Borough of Princeton, overwhelmingly opposed the application. (A72a-79a, A84a-87a).

At the February 2012 meeting, SHPO Administrator Saunders told the HSC that its review authority was limited to the abandonment of the easement although there was no question that this abandonment was going to lead to other changes. (1T14:10-15:4). Although he acknowledged the significant expected adverse effects from the proposed action, including the end of the Princeton Station's life as a terminal train station, Mr. Saunders recommended that the HSC approve the Application under NJT's view that it was legally obligated to relocate the terminus and that the relocation would trigger the easement expiration

clause leaving the property in the University's sole ownership in five-years. (A73a-A74a). As stated above in the Procedural History, the HSC adopted a resolution recommending that the Commissioner authorize the project, and this resolution was affirmed by the Assistant Commissioner for Natural and Historic Resources for DEP.

IV. ERRORS COMPLAINED OF

The Register Act seeks to preserve historic sites for the benefit of the public. In re Application of North Jersey District Water Supply, 175 N.J. Super. 167, certif. den. 85 N.J. 460 (1980). When the Princeton Railroad Station was listed on the New Jersey Registers in 1984, it was listed because it was an operating passenger railroad station, and its transportation function, supported by the track bed, the rails, the catenary and the platform, was deemed worthy of historic site protection. The listing was not intended to preserve a relic suitable only for adaptive reuse.

NJT could presumably determine that there is no longer a transportation need for the Princeton Station and could shut the station down. In that event, NJT would be able to proceed with an encroachment application based on its independent assessment of the public good. But that is not what happened here. Instead, in 1984 NJT and a private party, the University, entered into a contract that effected the sale of the station property subject

to NJT retaining ownership and control of railway facilities (e.g. tracks and the catenary) and reserved a public transportation easement. The 1984 sale, because it included a property interest in a registered historic site, should have triggered historic sites review pursuant to N.J.A.C.7:4-1.3, which had for at least four years covered sales of a registered historic property by the public sector. See N.J. Register 7:4-1.3, p. 4-3 (Supp. 7-17-80); see also N.J. Register 7:4-4.1 - 4.4.3 (Supp. 7-17-80) (creating SHPO and HSC review process similar to current process). Thus in 2012, when NJT for the first time sought historic sites approval for its plan to prematurely relinquish 460 feet of the public easement in the Princeton Station, this was 28 years after NJT had been able to pass control over the Station property to the University while bypassing the historic review that should have occurred in 1984.

The 1984 contract therefore had two enormous consequences in NJT's 2012 "track removal" application. First, NJT was able to claim that the 1984 contract obligated NJT to relocate the terminus to accommodate the University's private development plans "anticipated" in 1984. (A21a). Second, NJT was able to structure its application to limit DEP review to the premature termination of an easement, because the University - a private party and therefore not covered by the Register Act - would perform or pay for the work attendant to the dismantling of the

Princeton Station as a functioning railway station. So not only did the public interest vanish, but HSC was left with an encroachment application dealing with an abstract property interest and explicitly structured to exclude from review the actual plans for the "adaptive reuse" of the historic site. In the face of NJT's aggressive position about its legal obligations to the University, the HSC, following the guidance of SHPO Administrator Saunders, simply deferred, treating the application as unique and accepting that little could be done in terms of historic preservation except through precatory recommendations regarding the "rehabilitation" of the station property that the University was free to ignore. The Assistant Commissioner followed suit in his summary affirmance. The result was that the agency charged with responsibility for preserving historic sites essentially turned a blind eye to a private arrangement between NJT and Princeton University that blatantly circumvented the requirements of the Register Act.

The Appellate Division, in affirming the DEP approval of NJT's application, committed the following errors:

(A) The court erred in affirming an encroachment approval given to accommodate the private development plans of a private entity, on a record with no meaningful analysis of factors that are required by the Register Act to justify an encroachment approval. The court thus ignored the fundamental requirements of

the Act, its implementing regulations and established precedent, all of which require governmental entities to justify encroachment on a protected historic resource by showing that the project furthers a public interest that outweighs the damage to the resource and that there is no feasible alternative. N.J.A.C.7:4-7 et. seq. See Beattystown Cmty. Council v. Dep't of Env't'l Prot., 313 N.J. Super. 236 (App. Div. 1998); In re Project Authorization under the New Jersey Register of Historic Places Act, 408 N.J. Super. 540 (App. Div. 2009), certif. den 201 N.J. 154 (2010).

(B) The court erred in affirming an encroachment approval founded on a contract that transferred to a private party, not covered by the Act, the power to take the very actions that should be the subject of an encroachment application.

(C) The court erred in affirming an encroachment approval that deferred to and rested upon the applicant's self-justifying position about its contractual obligations, even though the contract in question improperly bypassed historic sites review, even though both the applicant and the DEP were aware that the contract obligations were under dispute in pending litigation, and even though the court was aware that a Chancery Judge had made findings that refuted the applicant's position about its obligations.

(D) The court erred in affirming approval of an encroachment

application structured to prevent the HSC from considering the proposed physical alterations to the site, thus essentially condoning an improper constriction of DEP historic sites jurisdiction and condoning a review process that prevented the agency with expertise on historic site issues from exercising that expertise

(E) The court erred in its determination that the encroachment approval was not arbitrary and capricious when that approval was manifestly mistaken and lacked the foundation in law and in fact required by the terms of the Register Act to justify permission to encroach. See Swede v. Clifton, 22 N.J. 303, 312 (1956) (agency action in violation of a legislative mandate is ultra vires and void); Riverside General v. NJ Hosp. Rate Setting Com'n, 98 N.J. 458, 468-469 (1984) (judicial review of agency action requires a searching review of the record).

V. REASONS WHY CERTIFICATION SHOULD BE ALLOWED

Certification should be granted because this case presents an issue of ongoing and significant general public importance. This case presents this Court with an opportunity to confirm to public agencies with responsibility for New Jersey's historic resource, to the Department of Environmental Protection, and to the courts that the Register Act imposes obligations that are to be taken seriously and that are not to be brushed aside at the

behest of a private entity, however influential and however well-funded.

Our Legislature has determined that our historic heritage is to be preserved. A significant part of that preservation effort must be through good-faith efforts of our State agencies. As the Appellate Division opinion stands, this case is a blueprint of how a State agency can prevent meaningful review of private agreements that facilitate the destruction of an irreplaceable historic resource.

VI. COMMENTS WITH RESPECT TO THE APPELLATE DIVISION OPINION

The Appellate Division opinion barely notes the legal maneuvering by NJT and the University designed to render historic review of the destruction of the Dinky station meaningless. While recognizing that NJT's encroachment application rested on the terms of its alleged contractual obligations to the University, the court ignores the essential points that the 1984 agreement was never subjected to historic review and that NJT's application was brought not in the furtherance of a demonstrated public interest but because the University - a private party - had exercised an alleged right under the 1984 agreement to determine the fate of the historic site by compelling NJT to relocate the terminus, thus ending its transportation function.

The Appellate Division opinion, strikingly, accepts without remark the astonishing fact that a request by Princeton

University defined New Jersey public policy with regard both to historic preservation and to a core transportation policy choice about the appropriate location of a railroad terminus. Thus, at pages 5-6, the court states as follows as if it were of no moment:

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.

The University had a proposal for a substantial arts center and an access road to its parking garage, and the Princeton Station was in the way. Therefore, with little analysis, the easement preserved in 1984 and the functioning aspects of the Princeton Station had to be abandoned.

The court's opinion acknowledges that the abandonment of the easement would have severe adverse impacts on the Princeton Station, including the loss of its historic transportation function and the removal of its defining railroad infrastructure. The court also recognized that these harsh adverse effects would need to be justified by a countervailing public benefit. Yet, faced with a record bereft of any such justification and an HSC resolution that neither uses the word "benefit" nor explicitly finds a benefit, the Court's opinion simply invents benefits that

the agency did not find. Thus, at p. 18, the opinion states that the HSC "recognized" benefits that were accruing to the public. Remarkably, in context, the court listed as a benefit the proposed construction of a "new train station for the Dinky line only 460 feet from the current location." (Op. 18) However, the HSC did not find this. Indeed, the only conceivable record support for the peculiar view that a modern and less convenient station counts as a "benefit" in an application to encroach on an historic station comes from statements made by NJT and University representatives in the meetings. Public comment, including comment from transportation experts, was overwhelmingly to the effect that the public interest is not served when a convenient functioning in-town station is decommissioned and replaced by a station farther away from town with no pedestrian public street access.

The court also improperly treated as a "finding" of benefit a narrative statement in the HSC resolution that "incorporated in [the University's] plan are improvements to reduce traffic congestion." (Op.18, A95a). Moreover, the record provided no proof of any such improvements and no showing that any such traffic improvements would necessitate the abandonment of the station.

Improbably, the court found a benefit in one of the mitigating steps required by the HSC: the installation of

interpretative displays to promote public awareness of the history of the Station, as if the destruction of an irreplaceable historic railroad station was somehow balanced by the creation of a memorial to that station.

The court's treatment of alternatives is likewise flawed. The court was surely aware that the HSC resolution neither mentions nor makes a finding with respect to alternatives. Yet, the court ignored this shortcoming and, without citation to the record, simply stated that Council members recognized there were limited alternatives "given the terms of the 1984 sales agreement and the 1996 amendment anticipating NJT's relocation of the easement." (Op. 18).

Finally, the court's treatment of the contract issue is inexplicable in view of the supplementation of the record by the December 23 opinion in the Chancery Division matter. Judge Innes' analysis refutes the two legal claims at the heart of NJT's application. He found that the proposed move 460 feet southward would not constitute an abandonment of the easement under the contract (Sa15a), thus directly contradicting NJT's argument that premature termination of the easement would be justified because it would expire anyway five years after the relocation. Second, Judge Innes rejected NJT's claim that the 1984 agreement gave the University the right to relocate the terminus. As Judge Innes found:

[U]nder the 1984 Sales Agreement or the 1996 Agreement. . . Princeton University has no right to alter the service to the Dinky in any way without the express approval of NJ Transit. By so structuring the agreements, NJ Transit did not delegate its authority to alter the easement. . . Rather, it simply granted Princeton University the right to propose any such alteration.

By approving the plans, NJ Transit exercised its discretion it retained in the easement to alter the passenger related services located in the station property. If NJ Transit were to have an objection, its denial of the plans would prevent any alteration to the services within the station property. (Salla-12a).

These key findings, made in parallel litigation involving the same parties, thoroughly undermine the legal arguments on which NJT founded its encroachment application. Judge Innes' opinion clarifies that under the 1984 contract NJT had the discretion to say no to the terminus relocation request. Under the Register Act, NJT should have sought encroachment approval before ever saying yes. In view of these findings, the Appellate Division should have remanded the matter to the DEP with instructions that the application be reconsidered. The interests of justice and the evenhanded administration of the law required no less.

April 17, 2014

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