MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY
IAS PART 18

VILLAGE OF SOUTHAMPTON,

Plaintiff,

- against -

METROPOLITAN TRANSPORTATION AUTHORITY and LONG ISLAND RAIL ROAD,

Defendants.

BY: ROBERT WEBSTER OLIVER, J.S.C.

INDEX #: 14097-2002

Esseks, Hefter & Angel, Esqs.
Attorneys for Plaintiffs
108 East Main Street
Riverhead, New York 11901

Carter, Ledyard & Milburn, Esqs.
Attorneys for Defendants
2 Wall Street
New York, New York 10005

This decision is addressed solely to defendants' application to vacate the Temporary Restraining Order and is not intended to be a determination of plaintiffs motion seeking an injunction precluding defendant from erecting the monopole hereinafter described nor a decision on defendant's cross motion dismissing plaintiffs complaint and granting a preliminary injunction against the plaintiff to permit the installation of the subject monopole. **As** stated at the oral argument of both motions **(p.** 4, l. 11-17), the parties and the Court have agreed that, at present, the sole issue before the Court is "whether or not we continue the TRO?"

The Temporary Restraining Order (TRO) was granted, after oral argument held on May 30, 2002 by Mr. Justice Pitts. The date of the TRO is of even date therewith. The TRO provided as follows:

> ***ORDERED,*** that pending the return date of this motion, Defendants and their employees or agents are restrained from installing, constructing or continuing with construction of a communications tower (partially constructed) at the Southampton Village train station.

As background, the defendants, the Metropolitan Transportation Authority and its subsidiary, the Long Island Railroad have commenced construction of a mobile radio communications pole, also known as a monopole located nearby a 19th century railroad station. The plaintiff, the Village of

Southampton have commenced this action to halt construction. Essentially they allege that the defendants improperly commenced construction without consulting the Village pursuant to a procedure required by the National Historic Preservation Act (hereinafter NHPA) (16 USC 407f) also referred to in these papers as Section 106.

The defendants are public authorities and the LIRR is a commuter rail line providing service between Manhattan and Long Island. The defendants argue that the MTA, the parent public authority, is regulated by Title 11 of the Public Authority Law (hereinafter PAL).

Public Authority Law § 1266(8) states:

> 8. The authority may do all things it deems necessary, convenient or desirable to manage, control and direct the maintenance and operation of transportation facilities, equipment or real property operated by or under contract, lease or other arrangement with the authority and its subsidiaries, and New York city transit authority and its subsidiaries. Except as hereinafter specially provided, no municipality or political subdivision, including but not limited to a county, city, village, town or school or other district shall have jurisdiction over any facilities of the authority and its subsidiaries, and New York city transit authority and its subsidiaries, or any other activities or operations. The local laws, resolutions, ordinances, rules and regulations of a municipality or political subdivision, heretofore or hereafter adopted, conflicting with this title, or any rule or regulation of the authority or its subsidiaries, or New York city transit authority or its subsidiaries, shall not be applicable to the activities or operations of the authority and its subsidiaries, and New York city transit authority, or the facilities of the authority and its subsidiaries, and New York city transit authority and its subsidiaries, except such facilities that are devoted to purposes other than transportation or transit purposes. Each municipality or political subdivision, including but not limited to a county, city, village, town or district in which any facilities of the authority or its subsidiaries, or New York city transit authority or its subsidiaries are located, shall provide for such facilities police, fire and health protection services of the same character and to the same extent as those provided for residents of such municipality or political subdivision.
>
> The jurisdiction, supervision, powers and duties of the department of transportatiori of the state under the transportation law shall not extend to the authority in the exercise of any of its powers under this title. The authority may agree with such department for the execution by such department of any grade crossing elimination project or any grade crossing separation reconstruction project along any railroad facility operated by the authority or by one of its subsidiary corporations or under contract, lease or other arrangement with the authority. Any such project shall be

executed as provided in article ten of the transportation law and the railroad law, respectively, and the costs of any such project shall be borne as provided in such laws, except that the authority's share of such costs shall be borne by the state.

The LIRR has provided the Court with evidence that the monopole is safe and that it is safer than the existing tower. The Village disagrees but produces no evidence to support its claim. However, this is a question of fact that should be tested not just accepted on the word of the defendants.

The Village has argued that the defendants have not followed the proper procedure laid out in the law to protect historic properties before commencing this construction.

The defendants argue that the State regulates historic properties under the New York State Parks, Recreation and Historic Preservation Law (hereinafter PRHP).

However, since the FAA and FTA are Federal agencies involved in this project, and the monopole is being constructed pursuant to a Master Agreement entered into with the FTA (Federal Transit Administration), the applicable statute is the National Historic Preservation Act (16 USC 407f), the aforesaid Section 106.

It is section 106 (see, CFR Part 80 and 16 USCA 470[f]) that the plaintiff relies upon as its principal defense at this part of the action. The plaintiff argues lack of proper, prior notice and failure to be invited to consult in the planning and design of the project.

Defendants admit that they did not give prior notice or that the Village was given the statutory opportunity to consult. Thus, the Village's claim is a violation of due process to which they, especially, as the sovereign municipality within whose territorial jurisdiction the project lies, are entitled. Further, PAL § 1266(8) requires the Village to expend its funds to "provide for such facilities (as) police, fire and health protection services of the same character and to the same extent as those provided to Village residents. Therefore, the law requires expenditure of Village funds without affording the Village notice or consultation rights.

By definition, prior due process notice must be given before the project commences, especially, where the Village is entitled to consult and obligated to expend its citizen's funds.

Initially, when applying Section 106, an agency official is required to make a threshold determination if the proposed activity has the potential to cause effects on a historic property. 36 CFR § 800.3(a) states:

(a) Establish undertaking. The agency official shall determine whether the

> proposed Federal action is an undertaking as defined in Sec. 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties (section 800.16[y] sets forth criteria for the project).
>
> (a)(1) No potential to cause effects. If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official **has no further obligation under section 106 or this part** (emphasis added).

Pursuant to defendants' interpretation of the highlighted phrase, the defendants apparently decided that there was no potential to effect historic properties they were absolved from all further requirements of law. Since the plaintiff raises the Constitutional issue of due process, and none of the papers before the Court direct their attention to this issue, obviously that issue must be further reviewed. However, the Court is placed in a quandary: does it have jurisdiction and if not it cannot grant a valid TRO.

Further, on what is before it, conflicting interpretations of law that rest on fact questions not tested by cross examination or sufficient evidence, the Court cannot decide these motions at this point. Clearly, this whole matter must be tested in Court.

As plaintiff argues, it is entitled to notice by common law and by statute and bases its reasoning as follows:

The Village is a soverignty municipality. It is a small Village, but its citizens love it. It is a beautiful village and has within its jurisdiction the subject Historic District. It seems logical that this Government is entitled to prior notice that a superior government is entering its jurisdiction and imposing a 150 foot structure while requiring the Village to apply its own forces and expend its own funds to service the structure. Since Magna Charta, we English speaking peoples have lived by the concept of prior notice and the ability for those with conflicting views to confront each other in the proper forum.

The Southampton Railroad Station is listed on the National Register of Historic Places. There is an existing tower at Southampton Station (in actuality there are two poles, but they are piggy backed one upon another therefor comprising a single pole). This pole is 80 feet in height. The tower is larger in width, and is in front of the station and closer to the station than the proposed monopole. The proposed monopole will replace the tower and the existing tower will be tom down when the monopole is completed.

The Court, with the express permission of the parties, viewed the site and observed the existing tower and the partially completed monopole. The partially completed monopole is further

away and to" the rear of the station than the existing tower.

The proposed monopole is part of a project undertaken by the LIRR to improve radio communications with trains in order to comply with Federal Railroad Safety Act regulations. Presently, defendants allege the tower that exists leaves unsafe gaps in communication with trains on the north and south forks of Long Island. The LIRR argues that these improvements in radio communication is needed for the public health and safety and for the effective, safe operation of the Railroad.

The LIRR claims that it had considered locating the monopole or the equipment to be installed at it at other sites, but it reasonably determined that the monopole should be constructed on Long Island Railroad property to permit the Long Island Railroad to provide and control the security for the state of the art communications equipment to ensure its operability in emergency situations and to protect it from criminal destruction. The location at the Southampton Station was chosen not only for security purposes but because the physical location is midway between the LIRR's rail service on the North and South forks.

But plaintiff argues that defendants' interpretation of § 106 and 800.3(a)(1) as absolving the defendant from any "further obligations under § 106 and this part" is flawed. Their argument seems to be that a "no impact" determination gives defendants a carte blanche.

What right does the Village have to notice? Plaintiff claims a statutory right. Defendant claims none.

Section 106 (16 USCA 470[f]) is incorporated by reference into Part 800 of PRHP and § 800.3(a) and (a[13) provide for the use of § 106 **procedures** rather than State procedures ***(see,*** PRHP § 800.3[a][1]).

However, PRHP § 800.2(a)(4) requires the appointed "agency official" to involve the consulting parties in findings and determinations made during the § 106 process. Logically, this means involvement at the commencement of the § 106 procedure, i.e., before the significant impact or no impact findings are made since until that threshold determination is made, what § 106 procedures will be applied?

Further, PRHP § 800.2(a)(4) provides that SHPO (the State Historic Preservation Office) is to cooperate with "local governments."

Simple logic, beyond the law, requires the above. How can SHPO make a significant impact or no impact determination if it does not visit the Village. If it does visit the Village how can it not consult with Village representatives to determine if there are any special or unique problems. Besides

there is the obligation to consult.

To make the requirement of the involvement of the local government even more obvious, PRHP § 800.2(a)(4) says:

> Consultation: The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process.

Subparagraph (c) of that part of § 800.2 requires that SHPO advises and assists federal agencies in carrying out the § 106 responsibilities and cooperate with such agencies as local governments which are defined in Part § 800.2(c)(3) as follows:

> Representatives of local government: **A** representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party.

There is no proof before the Court as to how an agency official is selected. However, § 800.2(a) specifically provides that the local government may be authorized to act as the agency official. Not only was there no notice or consultation, there was no inquiry as to the willingness or fitness of the Village to act as such agency official.

In other words, from what is before the Court at this time, whether by accident or design, the Village was completely omitted from the very beginning of the project.

The Court does note that the role of the Village appears to be one of a consultant without power to control or power to veto. Yet the law before the Court specifically reserves a role for the Village in the process. Might the suggestions and thoughts of the Village have been of assistance? The procedure followed does not permit us to know.

As said before, the whole process, the rights of the parties and the correctness and adequacy of the decisions and determinations made by defendants and government agencies have not yet been tested. The ex parte conferences and the oral and written arguments give rise to numerous questions of fact too numerous to list. Yet, it is clear that there is conflict which only this Court may resolve. It is also clear that the Court is presented with a most unsatisfactory choice:

Lift and vacate the TRO and let defendant proceed with construction or continue the TRO as it stands.

The danger here is that construction will be completed or about completed by the time the

Courts finish their review and render an opinion. If that final decision is in favor of the Village, we will be faced with an existing structure, effectively an affaire de complete or a Hobson's Choice.

However, if the Court sees fit not to vacate the TRO, defendant will experience unexpected costs and expenses. Further, they argue that it may create safety concerns for the residents of the Village and the public at large.

Therefore, in view of all that is presently known to the Court, the Temporary Restraining Order granted by Mr. Justice Pitts on May 30, 2002 is lifted and vacated in its entirety on the following conditions:

a) if the final determination of the Court is rendered in favor of the Village, the defendant will raze the constructed monopole as erected even if construction to completion and will remove all debris and restore the site to its previous condition at the sole cost and expense of the defendant. The Court notes that defendants have already agreed to this condition (see, Hearing Transcript pg. 110 l. 22 - 25 and pg. 111 l. 1-5).

b) the existing lattice work pole will not be razed and will be maintained in proper and good working condition until the Court has made a final determination on the propriety of erecting the monopole. If the final decision is in favor of the defendants, they may proceed to raze this pole, as planned. This second condition is fixed *sua sponte* as a reasonable safeguard for the Village in the event the structure is, in whole or in part, built and when the Village is successful in this proceeding.

The Court is aware that either, or both parties may seek to appeal this decision. Therefore, to maintain status quo, the TRO will remain in place until noon of Friday, July 5,2002

Dated: June 27, 2002

ROBERT WEBSTER OLIVER, J.S.C.