

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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In the Matter of an Article 78 Proceeding

ROBERT B. BERNSTEIN,
Petitioner-Respondent,

Docket Nos.:
2005-03677;2005-06091

-against-

PAUL J. FEINER, as Town Supervisor, Town of
Greenburgh, New York, and the TOWN OF
GREENBURGH,

Respondents-Appellants.

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**AFFIRMATION OF ROBERT B. BERNSTEIN IN OPPOSITION TO MOTION FOR
LEAVE TO APPEAR AS AMICUS CURIAE**

Petitioner-Respondent ROBERT B. BERNSTEIN pro se, an attorney duly
admitted in the Courts of the State of New York, affirms under penalties of perjury as follows:

1. I am the Petitioner-Respondent in the above captioned action and make this affirmation in opposition to the motion of a group calling itself the “Village Officials Committee” (“Movant”) for an Order, pursuant to 22 NYCRR 670.11 granting leave for this group to appear as *amicus curiae*, file a brief in support of the appeal in this proceeding of Respondent-Appellants, and make oral argument. As shown below, Movant has not met any of the criteria required for *amicus curiae* relief. However, if the leave requested is granted, Petitioner-Respondent respectfully requests permission to file a short response not to exceed 1,500 words. I am fully familiar with the facts set forth herein.

2. This is an appeal from a decision, order and judgment by the Supreme Court, Westchester County, in favor of Petitioner-Respondent, a resident of the unincorporated

area of the Town of Greenburgh, that, in accordance with Town Law §§ 220 and 232, a park open town-wide must be paid for town-wide, and that the Town's intent to charge only residents of unincorporated Greenburgh for such costs was unlawful. Respondents-Appellants are Paul J. Feiner, the Town Supervisor, and the Town of Greenburgh. On February 8, 2006, Respondents-Appellants perfected their appeal in this case by filing a thirty-eight page 9,008-word brief. On March 16, 2006, petitioner-respondent filed a 36-page 8,752-word answering brief.

3. Movant proposes to file 17-page 4,133 word brief accompanied by an 11-page addendum of excerpts from a local government handbook. Under rules promulgated by the Court of Appeals, 22 NYCRR 500.22(e), motions for *amicus curiae* relief "must include consideration of and satisfaction to the court of at least one of the following criteria: (1) a showing that the parties are not capable of a full and adequate presentation and that movants could remedy this deficiency; (2) that movants would invite the court's attention to the law or arguments which might otherwise escape its consideration; or (3) that *amicus curiae* briefs would otherwise be of special assistance to the court." Movant has not even addressed these criteria, much less satisfied any of them.

4. First, there is no showing by Movant that the parties "are not capable of a full and adequate presentation." The motion is supported by two affidavits, one from David A. Koenigsberg, Esq., a lawyer representing the Movant, and the other from Peter Swiderski, a member of Movant's group. For his part, all Mr. Koenigsberg does is attach copies of the two rulings issued by the Supreme Court that are at issue on this appeal, and says nothing further.

5. Mr. Swiderski gives certain background facts about his group, noting that it consists of a mayor and trustee from each of Greenburgh's six incorporated villages, and that it was "formed for the purpose of representing the interests of the six villages before the

Greenburgh Town Board.” Affidavit of Peter Swiderski, sworn to March 7, 2006 (“Swiderski Aff.”), ¶¶ 2-3. He further states that Movant has an interest in the matter because (i) village residents have a majority of the population of the Town, (ii) the Town provides “few services” to the villages, (iii), the Town’s budget includes a section applicable to the entire town, including the villages and a section applicable only to the unincorporated areas of the Town, and (iv) that his group is aware of the decisions being appealed from and “supports the Town’s position as expressed in the Town’s brief.” Swiderski Aff., ¶ 4.

6. However, Mr. Swiderski nowhere explains why the Town is not capable of a “full and adequate presentation,” he nowhere addresses in what respects, if any, the Town’s brief is deficient, and he nowhere states in what respects, if any, Movant’s brief “could remedy this deficiency.” The first criteria is therefore not met.

7. Second, Movant nowhere invites the Court’s attention to “the law or arguments which might otherwise escape its consideration.” Instead, Movant merely repeats the same arguments that the Town has already advanced in this matter. Thus, Movant asserts that “Chapter 891 of the 1982 New York Session Law . . . was expressly enacted to supplant Town Law § 232,” that “Chapter 891 directly mandates that the cost of parks in the Town be taxed to the unincorporated areas,” and that the trial erred in reading Chapter 891 not as a mandate, but as a conditional statute, i.e., conditioned on the parks being restricted in use to residents of unincorporated Greenburgh. Swiderski Aff. ¶ 6.

8. However, these are the same arguments already being advanced by Respondents-Appellants. See e.g., Brief of Respondents-Appellants, filed February 8, 2006, Point I, entitled, “The Town of Greenburgh’s Assessment, Levy and Collection of Tax Solely from the Owners Of Property Located Within the Unincorporated Area of the Town, in Order to

Finance the Cost of Acquisition, Operation and Maintenance of Taxter Ridge as Parkland to Be Made Available for Use by All Persons Irrespective of Their Residency Status, Does Not Constitute a Violation of Town Law § 232" which says the same thing. Movant thus proposes to add nothing to what the Court already has before it. Thus, the second criteria is not met.

9. Finally, Movant nowhere demonstrates that its brief would “otherwise be of special assistance to the Court.” Respondents-Appellants perfected their appeal at the request of elected village officials in order to persist in their joint effort to force a *minority* of Town residents, *i.e.*, the residents of the Town’s unincorporated areas, to pay for the Town’s entire cost of an amenity for *all* Town residents. Residents of the unincorporated areas have no elected officials answerable solely to them. However, the fact that village residents have their own elected officials should not by itself entitle them to come before the Court as an *amicus* where, as here, (i) by “support[ing] the Town’s position as expressed in the Town’s brief” their interests as village residents are, by their own admission, already adequately represented, (ii) the issue before the Court is one of Town law, not village law, and (iii) village officials offer nothing of their own that would “otherwise be of special assistance to the Court.” Granting leave here would simply give Respondents-Appellants additional firepower in the form of a third brief in addition to their opening and reply briefs, from which they presumably hope to gain a tactical disadvantage.

10. However, if *amicus* relief is granted, Petitioner-Respondent respectfully requests in the interests of fairness that he be given an opportunity to submit within ten days of the filing of the proposed *amicus* brief a short response consisting of no more than 1,500 words.

WHEREFORE, the undersigned respectfully requests that the motion of the self-styled “Village Officials Committee” to leave to file an *amicus curiae* brief, and to make oral argument in connection therewith, be denied in all respects; alternatively, if *amicus* relief is

granted, Petitioner-Respondent respectfully requests leave to file a response of no more than 1,500 words within ten days of the filing of such amicus brief.

Dated: March 23, 2006
Hartsdale, New York

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