

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of an	:	
Article 78 Proceeding	:	
	:	
ROBERT B. BERNSTEIN,	:	Index No. 6805-06
	:	
Petitioner,	:	
	:	
v.	:	
	:	
PAUL J. FEINER, as Town Supervisor,	:	
Town of Greenburgh, New York, and the TOWN OF	:	
GREENBURGH,	:	
	:	
Respondents.	:	

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**AFFIRMATION OF ROBERT B. BERNSTEIN IN OPPOSITION
TO RESPONDENTS' MOTION FOR STAY**

ROBERT B. BERNSTEIN, an attorney duly admitted in the courts of the State of New York affirms, and under penalty of perjury, states:

1. I am the petitioner *pro se* in the above-captioned matter and, as such, am familiar with the facts and circumstances herein.
2. This affirmation is in opposition to Respondents' Motion for a Stay Pursuant to CPLR § 7805. As shown below, Respondents have not satisfied any of the criteria for granting a stay of this action.
3. This Article 78 proceeding seeks a declaration that Respondents Paul J. Feiner, Town Supervisor of the Town of Greenburgh (the "Town"), and the Town, acted unlawfully on December 19, 2005, when they adopted a budget for the calendar year 2006 which

requires the Town to assess, levy and collect taxes solely from owners of property located in the Town's unincorporated areas for the Town's costs for all parks, playgrounds, recreational and other facilities that are available for use by all persons in the town, irrespective of their residency status.

4. This action is related to a prior action by Petitioner under Article 78, *Bernstein v. Feiner*, Index No. 03-10944, in which this Court held, by Decision, Order and Judgment dated February 17, 2005, that Respondents' assessment, levy and collect of a tax solely from the owners of property located within the unincorporated areas 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, constitutes a violation of Town Law § 232.

5. Respondents argue for a stay based upon CPLR 5519(a) which provides that service of a notice of appeal "stays all proceedings to enforce the judgment or order appealed from" where the appellant is a political subdivision of the State or the officer of any such political subdivision. See Affirmation of David A. Fried, dated May 4, 2006 ("Fried Aff."), ¶¶ 9-10.

6. Respondents argue that since they timely filed a notice of appeal in the case of *Bernstein v. Feiner*, Index No. 03-10944, which concerned one of the Town's parks -- Taxter Ridge -- such filing should stay Petitioner from seeking a similar ruling with respect to any other Town parks. Fried Aff., ¶ 10. However, the stay permitted by CPLR 5519(a) has been "strictly construed" to cover proceedings to enforce specific judgments or orders being appealed from and does not "stay the prosecution of a separate and distinct proceeding which is tangentially related to another case in which an appeal has been taken." *3 Lafayette Avenue*

Corp. v. Comptroller of the State of New York, 152 Misc.2d 108, 112, 574 N.Y.S.2d 656, 659 (Sup. Ct. Albany Cty. 1991) (filing of appeal by state that it had no right to offset certain money owed for Medicaid payments did not stay subsequent proceeding to collect those funds).

Accordingly, the fact that Respondents have filed an appeal of a judgment in respect of one Town park -- Taxter Ridge -- does not stay Petitioner from commencing a separate and distinct action based on different underlying facts to get a ruling with respect to the Town's *other* parks, playgrounds and recreational facilities.

7. Respondents next argue that “[e]ven if the present Article 78 proceeding does not fall within the meaning of ‘all proceedings,’ it would be ironic and burdensome for this Court to enforce its ruling in this proceeding while the Court’s prior order and judgment is stayed as a result of the Respondents’ appeal.” *Fried Aff.*, ¶ 11. In support of this argument, Respondents cite a McKinney’s practice commentary for the proposition that “[p]ending the outcome of an Article 78 proceeding, the court, on a motion of a party or *sua sponte*, may order a stay of further proceedings or a stay of enforcement of the determination upon review. Such stay, which is injunctive in nature, can be effective in maintaining the status quo until the Article 78 proceeding is resolved.” *Id.*

8. However, that same practice commentary makes clear that in determining whether such a request for a stay pursuant to CPLR 7805 should be granted, courts apply “the same criteria that are used in assessing a motion for preliminary injunction. . . the moving party must show (1) likelihood of success on the merits, (2) irreparable injury in the absence of provisional relief, and (3) a balancing of equities in the movant’s favor.” *See Alexander*, *Supp. Practice Commentaries*, McKinney’s *Cons. Laws of N.Y.*, Book 7B, CPLR 7805, 2006 *Cumulative Pocket Part*, at 355); see also *In the Matter of Jarrett v. Westchester Cty. Dep’t of*

Health, 166 Misc. 2d 777, 778, 638 N.Y.S.2d 269, 271 (Sup. Ct. West. Cty. 1995) (“this court will apply the criteria used to assess an application for a preliminary injunction in determining whether to grant a stay” under CPLR 7805). Here, however, Respondents make no such showing under any of these criteria.

A. Likelihood of Success on the Merits

9. Respondents do not -- and cannot -- make any showing that they are likely to succeed either on their appeal or on the merits of the instant case. By contrast, Petitioner’s arguments that Respondents may not discriminate against part of the Town by taxing only them for the Town’s costs of parks, playgrounds and recreational facilities open to all Town residents, irrespective of residency, are based on Town Law §§ 220 and 232, as well as a number of appellate court decisions rendered over many years. *See, e.g., Bernstein v. Feiner*, 13 A.D.3d 419, 520-21 (2d Dep’t 2004) (“[t]he statutes specifically mandate that the payment of all public improvements, such as parkland, be imposed upon *all* the taxpayers of a town”) (italics in original); *Incorporated Village of Ardsley v. Town of Greenburgh*, 55 N.Y.2d 915, 917 (1982) (town acted unlawfully in acquiring a town park with funds exclusively raised from the unincorporated areas of the town); *Ardsley v. Greenburgh*, 79 A.D.2d 628, 628 (2d Dep’t 1980) (costs for parks which are “open to all residents of the town, whether they be from incorporated or unincorporated areas” are town-wide charges, “to be assessed, levied, and collected from all taxable property in the town”).

10. Respondents nonetheless suggest that it might lawfully be permitted to discriminate against taxpayers in Greenburgh’s unincorporated areas because two of the parks at issue -- Massaro and Rumbrook Parks -- were purchased and/or developed “subject to grant agreements with the United States government” that do not permit use to be restricted “to just

residents of the Town residing in the area of the Town outside of the incorporated villages.” Fried Aff., ¶ 12.¹ However, the fact that a federal grant may require, as a condition of the grant, that Respondents not discriminate on the basis of residency and thus allow access to all, irrespective of residency, does not give Respondents a license to discriminate against taxpayers in the unincorporated areas who never consented to being taxed exclusively for such town-wide amenities -- and Respondents nowhere argue why that would ever be the case under any principle of New York law. In short, Respondents have not made any demonstration that they are likely to succeed on the merits.

B. Irreparable Injury In the Absence of Provisional Relief

11. Respondents do not argue that proceeding to decide the merits of the instant Article 78 proceeding will result in irreparable injury to anyone. To the contrary, they make the conclusory statement that because the “remedy Petitioner seeks would *affect* the tax levy of every Greenburgh resident, there is ample justification for this Court to maintain the status quo until a final decision on the Respondents’ appeal is reached.” Fried Aff., ¶ 11. (emphasis added). There are two remedies sought in this proceeding: a declaratory that Respondents actions in respect of the 2006 budget were unlawful and an injunction against future such violations. However, merely allowing the case to go forward will not alter the status quo of anything. Thus, if Respondents prevail, the fact that Petitioner’s remedy would “affect” the tax levy would be irrelevant. But if Petitioner prevails, if Respondents feel any stay is needed, they

¹ Respondents also suggest that their federal grants argument applies to “a number of the parks” mentioned in the Verified Petition but they identify only the two mentioned. Fried Aff., ¶ 12. Respondents further state that they will “demonstrate to the Court that certain other parks cited by Petitioner in the Petition are not “open to all Greenburgh residents town-wide, irrespective of residency,” Fried Aff., ¶ 13, but they have come forward with no evidence to support that assertion.

can make an application for the Court to consider at that time. For now, though, allowing the case to go forward -- and getting a ruling on the merits whatever it may be -- will not irreparably injure anyone's interest.

C. Balance of Equities Do Not Favor Respondents

12. Respondents do not -- and cannot -- make any showing that the balance of equities tip in their favor on this motion. This is a garden-variety Article 78 proceeding involving a question of law concerning Respondents' practice of charging only unincorporated area taxpayers for the costs of Town parks, playgrounds, and recreational facilities that are open town-wide to all residents in both the unincorporated and incorporated areas. If Petitioner is correct in his allegations, Respondents have been unlawfully discriminating for years against taxpayers residing in the Town's unincorporated areas. If that is so, it would be in the public interest for the Court to address that issue as quickly as possible so that there will be plenty of time to get a ruling to prevent further such acts of discrimination and to allow either side, if they so choose, to seek an appeal of that ruling -- much as Respondents have done with the appeal in the Taxter Ridge case.

13. Furthermore, the granting of a stay pending the Taxter appeal could prejudice Petitioner and others in the unincorporated areas in a multiplicity of ways. This proceeding was brought to get an determination with respect to the budget for the 2006 calendar year so that, if Petitioner prevails, Respondents would have sufficient time to make adjustments to the budget for the 2007 calendar year. But if a stay is granted, and Petitioner would have been entitled to have the expenses at issue charged town-wide to all town taxpayers, irrespective of residency, justice delayed by the stay will have been justice denied.

14. In addition, during the period of any such stay, Respondents would be free to try to obtain a litigation advantage in this action by, among other things, attempting to get the State Legislature to change the law so as to “legalize” Respondents’ otherwise unlawful discriminatory taxation scheme. Indeed, by e-mail dated April 17, 2006, a group from the incorporated villages submitted draft legislation to Respondent Feiner -- at Feiner’s request -- to do precisely that. Furthermore, if a stay were granted, Respondents would be free to continue to raise from money from the Town’s six village governments in order to augment their defense of this action. Thus, for example, on May 9, 2006, Respondent Feiner appeared before the Dobbs Ferry Board of Trustees to support an appropriation from that village of thousands of dollars for this purpose, which appropriation was granted. By contrast, residents of the unincorporated areas of Greenburgh have no elected officials answerable solely to them, they constitute a minority of the population of Greenburgh, there is no local government that can raise funds to defend their rights as taxpayers in unincorporated Greenburgh and, indeed, their tax dollars actually fund Respondents’ opposition to the instant Petition. Accordingly, their only recourse for the alleged violation of state law caused by Respondents’ discriminatory taxation scheme is through the instant effort by Petitioner pro se to seek legal redress through the courts. Consequently, granting the stay Respondents seek would enable them to continue to do whatever they can to make pursuing this litigation as burdensome and expensive to Petitioner as they can.

15. Finally, it should be noted that on May 8 -- one business day after receiving Respondents’ motion papers -- Petitioner informed Respondents’ counsel, Timothy Lewis, that Petitioner would oppose the instant motion for stay for the reasons set forth herein. However, Petitioner informed Mr. Lewis that if Respondents wanted a stay, Petitioner would be willing to enter into a temporary stay on consent -- but only on condition that the instant motion

be withdrawn and that the parties enter into good faith negotiations in an attempt to resolve the matter. Mr. Lewis asked if that meant Respondents would have to make “proposals” and he was told that it did. Mr. Lewis then responded that he could not make that commitment and Petitioner never heard back.

16. For the foregoing reasons, Petitioner respectfully requests that Respondents’ Motion for Stay Pursuant to CPLR § 7805, staying the instant action pending the appeal of the related action, *Bernstein v. Feiner*, Index No.: 03-10944, be denied in its entirety and that the Verified Petition for Relief be granted.

Dated: May 11, 2006
Hartsdale, New York

Yours, etc.,

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