

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. 6807-06

Petitioner, :

v. :

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

Respondents. :

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**AFFIDAVIT OF ROBERT B. BERNSTEIN IN OPPOSITION TO ORDER TO SHOW
CAUSE OF PROPOSED INTERVENER-RESPONDENTS**

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK

ROBERT B. BERNSTEIN, being duly sworn, deposes and says:

1. I am the Petitioner *pro se* in the above-captioned action and a lawyer duly admitted to practice in the Courts of the State of New York. I make this affidavit in opposition to the motion to intervene in this action by a group consisting of the mayors of each of Greenburgh's six incorporated villages and two villages themselves, i.e., the Villages of Hastings and Elmsford. (the "Proposed Intervener-Respondents" or "movants"). I am fully familiar with the facts set forth herein.

2. As will be fully demonstrated below, the motion by the Proposed Intervener-Respondents must be denied as (i) movants do not meet the legal standard for intervention under CPLR 7802(d), (ii) they are not necessary parties to this proceeding, AND (iii) their intervention is time-barred.

3. This Article 78 proceeding involves allegations that Respondents adopted a budget for fiscal 2006 that violates Town Law §§ 220 and 232 by taxing only residents in the Town's unincorporated areas for the town's costs for parks, playgrounds and recreational facilities that are open to all residents of the Town, irrespective of residency. Because the matter in dispute concerns an issue of Town Law, the proposed Intervener-Respondents -- two of the six incorporated villages and all six village mayors -- do not, individually or collectively, have any legally cognizable interest in this dispute, and even if they did, to the extent they wish to argue that the Town acted illegally in allowing persons other than residents of unincorporated Greenburgh to use the town's parks, playgrounds and recreational facilities -- such defense is time-barred.

The Relevant Legal Standard

4. CPLR 7802(d) provides that in proceedings brought pursuant to Article 78, "[t]he court . . . may allow other interested parties to intervene." CPLR 7802(d). However, to be an "interested" party, one must have "a legally cognizable claim to intervene pursuant to CPLR 7802(d), rather than just a general interest in the result of the Article 78." *See Matter of New York Times Co. v. City of N.Y. Fire Dep't*, 195 Misc., 2d 119, 122-23, 754 N.Y.S. 2d 517 (Sup. Ct., N.Y. County 2003) (victims of 9/11 attacks who filed no freedom of information requests of their own had no cognizable legal claim to intervene in support of petitioner's appeal of the denial of certain such requests related to the attacks), *citing Matter of Greater N.Y. Health*

Care Facilities Assn. v. DeBuono, 91 N.Y.2d 716, 720, 674 N.Y.S.2d 634, 697 N.E.2d 589 (1998) (nursing homes adversely affected financially by state regulations establishing Medicaid reimbursement rates did not have legally cognizable claim to intervene in Article 78 proceeding where interveners' claims were time-barred); *see also In the Matter of Patterson Materials Corp. v. Zagata*, 237 A.D.2d 365, 366, 655 N.Y.S.2d 72, 73 (2d Dep't 1997) (intervention by a town, two local civic associations and a local resident properly denied in proceeding limited to whether state agency had previously granted petitioner a mining permit).

5. In other words, in order to have a legally cognizable interest, the proposed Intervener-Respondents must demonstrate that they have a legal right to be heard in the specific matter at issue. *See e.g., Clinton v. Summers*, 144 A.D.2d 145-147 (3d Dep't 1988) (Lake George property owners association allowed to intervene on behalf of town as appellant where environmental ruling favoring petitioner's development project threatened lake property and town itself had failed to appeal); *Kaplen v. Haverstraw*, 105 A.D.2d 690, 690 (2d Dep't 1984) (rental tenants protected under rent stabilization statute allowed to intervene to defend town in proceeding attacking town's declaration that rental emergency exists as to certain apartment complexes).

Movants Have No Legally Cognizable Interest in this Proceeding

6. Movants argue that intervention is warranted because they and their constituents will be "adversely impacted" if they have to pay their fair share of the Town's costs of parks, playgrounds and recreational facilities that are open town-wide. *See* Affirmation of Richard L. O'Rourke ("O'Rourke Aff."), dated May 15, 2006, ¶ 20. However, as this Article 78 proceeding is strictly about issues of Town Law, *see Bernstein v. Feiner*, 13 A.D.2d 519, 520-21 (2d Dep't 2004) (the "relevant statutes" are *Town Law* statutes that "specifically mandate" that

the payment of all public improvements, such as parks, be imposed “upon all the taxpayers of a town”) (emphasis in text), movants’ interest in this dispute is no different from that of any other unhappy taxpayer in Greenburgh who may be aggrieved by having to pay his or her fair share of taxes. While movants assert that “the Town government has no real ties to village residents” (O’Rourke Aff., ¶ 25), the inconvenient truth is that residents of Greenburgh’s incorporated villages constitute a majority of the town’s population and have the same right to vote for the town’s government as do the minority of residents who live in the town’s unincorporated areas. Village residents are also eligible to hold town-wide office. Indeed, Respondent Feiner was first elected town supervisor while a resident of the Village of Hastings, and one of the other Town Board members is a residents of the Village of Ardsley. In short, if residents of Greenburgh’s villages are unhappy that the free ride they have enjoyed at the expense of taxpayers in the town’s unincorporated areas may come to an end, their recourse is not with the courts -- but at the ballot box. That is where the town-wide elected officials who made the decision to freely open the parks to all town residents -- which put village residents in this predicament in the first place -- should be held accountable.

The Proposed Intervener-Respondents Are Not Necessary Parties in this Proceeding

7. The proposed Intervener-Respondents further assert that because they are “taxpaying residents of the villages” -- they are “necessary parties.” O’Rourke Aff., ¶ 11. However, the Court of Appeals held more than twenty years ago in a similar dispute that Greenburgh’s villages are not “necessary parties” when the matter concerns the town’s alleged noncompliance with Town Law § 220. *See Incorporated Village of Ardsley v. Greenburgh*, 55 N.Y.2d 915, 917 (1982) (“Nor are the villages other than Ardsley within the town necessary parties to the action, section 220 having given the town board authority to acquire a town-wide

park without consultation with or leave by the villages within the town”). If the villages themselves are not necessary parties in matters concerning the very same Town Law statute at issue in *Ardsley v. Greenburgh*, it follows inexorably that their mayors are likewise not necessary parties either there or here.

8. Indeed, the inappropriateness of allowing movants to intervene in this matter was recently underscored when, as movants themselves candidly admit, see O’Rourke Aff., ¶ 21, on March 31, 2006, a unanimous four-judge panel of the Appellate Division, Second Department, denied the village mayors’ motion for leave to file an *amicus curiae* brief in support of Respondents’ position on the Taxter Ridge appeal. A copy of that order is attached hereto as Exhibit A.

9. The Proposed Intervener-Respondents assert that “[a]s the Court is well aware, the standard for filing an amicus brief in the Appellate Division is far different from and more stringent than the standard for granting a motion for intervention in this proceeding at the Supreme Court trial level.” *Id.* In fact, the proposed Intervener-Respondents have it exactly backwards. See *Kruger v. Bloomberg*, 1 Misc.2d 192, 195, 768 N.Y.S.2d 76, 80 (2003) (because a party who intervenes obtains the rights of a party, including the right to counterclaim, cross-claim, implead, appeal, etc., the standard for filing an amicus brief is less stringent than the standard for intervention under CPLR 7802(d)).

10. In short, if the village mayors could not even meet the less stringent standards for filing an *amicus* brief on the Taxter appeal, then it stands to reason that they should not be able to meet the stricter standards for intervening as a party, even under CPLR 7802(d).

11. The only case cited by the proposed Intervener-Respondents, *Elinor Homes Co. v. St. Lawrence*, 113 A.D.2d 25, 292 N.Y.S.2d 889 (2d Dep’t 1985) (see O’Rourke

Aff., ¶ 23) is not to the contrary. That case involved a taxpayer who sued a county treasurer for refusing to accept delinquent taxes that would have enabled the taxpayer to restore title to property that had been foreclosed. There, however, the proposed intervener was the county itself which, as the taxing authority which had foreclosed on the property, had legal custody of the tax sale certificates and legal custody of the funds. The county was obviously a necessary party to the action because it had legal control over the property in question. Here, by contrast, movants have no legal basis upon which to intervene.

Movants' Reliance on Chapter 891 Is Unavailing

12. The proposed Intervener-Respondents devote much of their submission to raising arguments based on Chapter 891 of the 1982 Sessions Laws (the "Finneran Law"). However, Chapter 891 confers no special legal rights on the proposed Intervener-Respondents that are at issue in this proceeding. Thus, Chapter 891 authorizes Greenburgh to charge only taxpayers in its unincorporated areas for the town's costs of parks, playgrounds and recreational facilities that are restricted in use to residents of unincorporated Greenburgh. Chapter 891 thus protects village taxpayers from being taxed for parks, playgrounds and recreational facilities that are restricted in use to residents of the town's unincorporated areas. However, the parks, playgrounds and recreational facilities at issue here are all open town-wide. Therefore, Chapter 891 is not applicable. *See Bernstein v. Feiner*, 13 A.D.3d at 520-21 (Town Law §§ 220 and 232 "specifically mandate" that the payment of all public improvements, such as parks, playgrounds and recreational facilities, "be imposed upon *all* the taxpayers of a town"). In so ruling, the Appellate Division rejected Respondents' argument that Chapter 891 was the applicable law. *See* Brief of Respondents-Respondents, filed December 19, 2003, at 13-16 ("Chapter 891, not Town Law § 220, is applicable with respect to the Town's acquisition, operation and

maintenance of public parkland”). A copy of those pages is attached as Exhibit A to Petitioner’s Sur-Reply Affidavit in Opposition to Respondents’ Motion for Stay.

Movants’ Intervention is Time-Barred

13. Intervention in an Article 78 is also not permitted if it would enable the movant to raise a claim or defense which would be time-barred. *See In the Matter of Greater New York Health Care Facilities Ass’n*, 91 N.Y.2d at 720 (“Intervention cannot be used as a means to revive stale claims.”) Yet that is precisely what movants seek to do. Thus, movants seek to argue that if village residents are required to pay their fair share for parks, playgrounds and recreational facilities that are open town-wide, it is because these facilities are “open to the public *in violation of the provisions of Chapter 891.*” *See* Verified Answer on Behalf of Interveners, ¶ 19 (emphasis added). Their argument is that Chapter 891 allegedly prohibits the town from ever allowing its parks, playgrounds, and recreational facilities to be open to any persons other than residents of unincorporated Greenburgh unless required to do so because of the requirements of a federal grant.

14. Petitioner and Respondents have already briefed the issue of whether the non-discrimination provisions of federal grant contracts would give Respondents the right to tax only residents of unincorporated Greenburgh for the cost of parks open town-wide. *See* Reply Affirmation of David Fried, dated May 18, 2006, ¶ 11 and Sur-Reply Affidavit of Robert B. Bernstein, dated May 23, 2006, ¶¶ 8-16. There is therefore no need for movants to intervene to make that argument.

15. But the proposed defense that the Town acted unlawfully in allowing persons other than residents of unincorporated Greenburgh to use town parks is not an argument that movants may raise. Under CPLR 217(1), claims against governments or government

officials must be brought within “four months after the determination to be reviewed becomes final and binding upon the petitioner.” Under CPLR 203(d), a defense to such claim is barred if it was barred at the time the claim asserted in the complaint was first interposed and as the Court of Appeals made clear in *Matter of Greater New York Health Care Facilities Ass’n*, 91 N.Y.2d at 720-22, intervention will not be permitted where the effect is to allow party to raise a matter which is time-barred.

16. Here, the parks, playgrounds and recreational facilities at issue in this proceeding have all been open town-wide for years. Thus, the Town’s decision to open these facilities “to the public” would have become final and binding many years ago. Thus, for example, one of the parks at issue, Harts Brook Park and Preserve, was acquired in the spring of 1999 and opened town-wide in September of that year. *See* “Estate Becomes Parkland,” *New York Times*, Aug. 1, 1999. (A copy of the article is attached hereto as Exhibit B). Because no decision to open any parks town-wide was made or alleged to have been made within the past four months, any such defense by the Proposed Intervener-Respondents would be time-barred. Thus, even if Chapter 891 were applicable here, and it is not, the proposed Intervener-Respondents would still have no legally cognizable basis for intervening.

The Finneran Letter Is Irrelevant Hearsay and Not Part of the Legislative History of Chapter 891

17. The proposed Intervener-Respondents argue that unless they are allowed to intervene, the Court will not have the benefit of a certain letter purportedly written in April 1982 by the author of Chapter 891, William Finneran. *See* O’Rourke Aff. ¶¶ 11-17. However, the letter itself is irrelevant inadmissible hearsay, a needless distraction, and its consideration would needlessly delay the proceedings. *See, e.g., In the Matter of Patterson Materials Corp.*, 237 A.D.2d at 366 (denial of intervention appropriate where intervenors seek to raise issues

which are not relevant and would delay the proceedings). The best evidence of what was intended by Chapter 891 is the text of the statute itself. Here, the text shows that Chapter 891 plainly applies to parks, playgrounds and recreational facilities that are restricted in use to residents of unincorporated Greenburgh, and the parks, playgrounds and recreational facilities at issue here are open town-wide. Indeed, the issue of parks, playgrounds and recreational facilities being open town-wide is nowhere discussed in the text of Chapter 891. Therefore, Chapter 891 has no application.

18. However, even if Chapter 891 were ambiguous, and it is not, courts may then look for guidance to the statute's legislative history. Here, however, the letter at issue was not part of the legislative history. A complete copy of the entire legislative history was attached as Exhibit B to the Bernstein Sur-Reply Affidavit dated May 23, 2006. It therefore is no official indication at all of what the legislature intended.

19. Finally, the text of the purported letter nowhere addresses the issue of whether taxpayers in unincorporated Greenburgh would be required to pay for the town's costs of parks, playgrounds and recreational facilities that are open town-wide. The letter-writer simply assumed that Greenburgh would maintain its practice of restricting the use of its parks to unincorporated area residents only. The letter is therefore irrelevant and certainly does not warrant intervention on the part of proposed Intervener-Respondents.

WHEREFORE, for the foregoing reasons, Petitioner respectfully requests that the Order to Show Cause for Order Granting Intervention by the proposed Intervener-Respondents be denied in its entirety.

Robert B. Bernstein
48 Old Colony Road
Hartsdale, New York 10530
(914) 522-8126

Sworn to before me this 25th
day of May 2006

Notary Public

TO: OFFICE OF TIMOTHY W. LEWIS
Town Attorney
Town of Greenburgh
Attorney for Respondents
177 Hillside Avenue
Greenburgh, New York 10607
(914) 993-1546

KEANE & BEANE, P.C.
Richard L. O'Rourke, Esq.
445 Hamilton Avenue, 15th Floor
White Plains, New York 10601

Attorneys for Jay Leon, as Mayor of the Village of Ardsley, Joseph Bova, as Mayor of the Village of Dobbs Ferry, Robert Williams, as Mayor of the Village of Elmsford, the Village of Elmsford, Wm. Lee Kinally Jr., as Mayor of the Village of Hastings-on-Hudson, the Village of Hastings-on-Hudson, Dennis Flood, as Mayor of the Village of Irvington, and Drew Fixell, as Mayor of the Village of Tarrytown
AS PROPOSED INTERVENER-RESPONDENTS