

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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SUR-REPLY AFFIDAVIT OF ROBERT B. BERNSTEIN
IN OPPOSITION TO RESPONDENTS' MOTION FOR STAY

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 matter and, as such, am familiar with the facts and circumstances herein. Petitioner submits this sur-reply to answer arguments raised for the first time by Respondents in the "Reply Affirmation in Support of Stay" submitted by deputy town attorney David R. Fried, dated May 17, 2006 ("Fried Reply Aff."). I am also an attorney duly admitted to practice in the courts of the State of New York.

2. In further support of their motion for a stay pending disposition of their appeal in the related Taxter Ridge litigation, Respondents make clear that if Petitioner should

prevail on appeal, they will not concede judgment in Petitioner's favor with respect to the parks, playgrounds and recreational facilities other than Taxter Ridge. To the contrary, Respondents contend that they may lawfully tax only residents of unincorporated Greenburgh for any parks, playgrounds and recreational facilities open town-wide, if such facilities were acquired with federal funds. Because Taxter Ridge was not acquired with federal funds, the legal effect, if any, of acquiring parks with federal funds is not likely to be addressed by the Appellate Division until after this Court rules on the merits of the instant Article 78 proceeding. Hence, staying the instant proceeding pending disposition of that appeal accomplishes nothing but delay.

3. In their moving papers, Respondents mentioned their argument about federal funds only in passing. *See* Affirmation of David R. Fried, dated May 4, 2006, ¶ 12. Thus, Respondents noted that a number of the parks which Petitioner refers to in paragraph 19 of the Verified Petition were "purchased and/or developed subject to grant agreements with the United States government and, pursuant to Section 2 of Chapter 891, may not be restricted in use to just residents of the Town residing in the area of the Town outside of the incorporated villages" -- but Respondents did not argue (until their reply) that the receipt of federal funds entitled them to charge the Town's costs for such parks only to residents of the unincorporated areas.

4. Because Respondents chose to raise their federal funds argument only in passing, Petitioner argued that Respondents nowhere demonstrated that they are likely to succeed on the merits of their claim -- which is one of the factors that courts may take into account in determining whether to enter a stay under CPLR 7805.

5. In Mr. Fried's reply affirmation, however, Respondents argued for the first time that the receipt of federal funds entitles them to tax only the unincorporated areas of the

Town for parks, playgrounds and recreational facilities that are open town-wide to all residents, irrespective of residency. *See* Fried Reply Aff., ¶ 11 (“Respondents will likely be successful on the merits of this case” based on the showing in Fried Aff., ¶ 12 that certain parks, playgrounds and recreational facilities were acquired with federal funds).

6. Under CPLR 7804(f), Respondents are supposed to raise any objection in point of law by “setting it forth in their answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer.” The rule thus provides that Petitioner would have notice and an opportunity to respond to any such objection. Here, however, Respondents moved for a stay without answering or moving to dismiss -- and raised their federal funds argument only in Mr. Fried’s reply affirmation on the stay motion. Accordingly, Petitioner has not had notice and an opportunity to answer Respondents’ objection in point of law based on federal funds. Because time has run on Respondents’ time to answer or move to dismiss, and because Respondents did not seek a temporary stay while their motion for stay is pending, the Verified Petition is now ripe for ruling. Accordingly, this sur-reply may be Petitioner’s only opportunity to answer Respondents’ federal funds argument.

7. Specifically, Respondents argue that, if not stayed, the relief sought by the Verified Petition should be denied because “Petitioner has failed to demonstrate that Chapter 891, upon which the Town relies, does not apply to the various parks cited in the Petition that are subject to grant agreements with the United States government.” Fried Reply Aff., ¶ 11. However, Chapter 891, by its terms, applies only to parks, playgrounds and recreational facilities that are restricted in use to residents of the unincorporated areas of the Town. Chapter 891 therefore does not apply to any of the parks, playgrounds or recreational facilities cited in the

Verified Petition because these facilities are all open to all Greenburgh residents, irrespective of residency, from both the incorporated villages and the Town's unincorporated areas.

8. Respondents nevertheless argue that because Chapter 891's "restriction in use" requirement is made "subject to grant agreements with the United States government" (Fried Aff. ¶ 11), this Court should construe Chapter 891 as permitting the Town to tax only residents in the Town's unincorporated areas for parks, playgrounds and recreational areas that are open town-wide to all residents, irrespective of residency. That argument is flawed for several reasons.

9. First, 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." See *Bernstein v. Feiner*, 13 A.D.2d 519, 520-21 (2d Dep't 2004) (emphasis in text). In so ruling, the Appellate Division squarely 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 the relevant pages from Respondents' appellate brief is attached hereto as Exhibit A.

10. The Second Department holding was consistent with its ruling in *Ardsley v. Greenburgh*, 79 A.D.2d 628, 628 (2d Dep't 1980), which held that 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"), *aff'd*, 55 N.Y.2d 915 (1982).

11. Second, in order for a New York statute to sanction part-town taxation, it must do so expressly. See *DuBois v. Town of New Paltz*, 35 N.Y.2d 617, 621 (1974) (absent an

express “command” in the statute requiring a town to exempt villages from part-town taxation, statute authorizing part-town taxation will not be construed as requiring it). Here, while Chapter 891 authorizes part-town taxation for parks, playgrounds and recreational facilities that are restricted in use to the part of the town to be taxed, there is nothing in the text of Chapter 891 which expressly authorizes part-town taxation for parks, playgrounds and recreational facilities that, because of a federal grant, must be open town-wide. To the contrary, the subject of part-town taxation for any facilities open town-wide is nowhere mentioned in the text of Chapter 891. Nor is the subject addressed in the legislative history. Indeed, the legislative history makes clear that all that was being sanctioned here was a “practice” by the Town of taxing only unincorporated areas residents for parks, playgrounds and recreational facilities that had been restricted in use to residents of those areas.¹

12. The practice needed to be sanctioned because part-town taxation requires the consent of the people to be taxed, either through the creation of a park district or by the creation of a special recreation district – both of which require as a prerequisite that there be a permissive referendum on the subject. *See* Town Law § 190 et seq. (authorizing the formation of special improvement districts) and Gen. Municipal Law § 244-c (authorizing the formation of a “recreation system”). Because that was never done in Greenburgh, chapter 891 was intended not to create a park or recreational district – because that would have required a vote of the people to be taxed – but merely to legalize the town’s otherwise unlawful practice. And since, as is evident

¹ The entire legislative history for Chapter 891 is attached hereto as Exhibit B. The reference to the statute’s purpose as authorizing a “practice” is from a State of New York Department of State Memorandum dated July 22, 1982 which is included therein.

from the legislative findings set forth in section 1 of Chapter 891, that practice did not involve any parks open town-wide, the subject was simply not addressed.

13. Third, it would be contrary to state law to assume, in construing Chapter 891, that the Legislature intended to strip residents of the unincorporated areas of Greenburgh of their statutory rights under New York law not to be taxed exclusively for the town's costs of any town improvement, such as parks, playgrounds and recreational facilities, without first giving their consent pursuant to the state laws governing permissive referenda. Thus, in construing and ultimately upholding a statute which authorized -- but which did not require -- town boards to impose part-town taxation in certain limited circumstances, the Court of Appeals held that "[i]n determining whether statutory requirements are arbitrary, unreasonable or discriminatory, it must be borne in mind that the choice of measures is for the legislature, who are presumed to have investigated the subject, and to have acted with reason, not from caprice." *Dubois v. Town of New Paltz*, 35 N.Y.2d at 623-24. Here, authorizing the Town of Greenburgh to impose part-town taxation on parks that are restricted in use is reasonable and consistent with the legislative findings that such parks had previously been restricted in use. It would be unreasonable, however, to construe the same provision as authorizing part-town taxation for parks that are not restricted in use, where there are no legislative findings concerning parks open town-wide and, indeed, no evidence that the legislature even investigated the issue.

14. Fourth, Respondents never address the point made in my affirmation in opposition to the stay that the non-discrimination clauses in the two federal grant contracts Respondents pointed to in their moving papers merely limit the municipality's right to restrict use of a park receiving federal funds to residents of the municipality. Such grant contracts

nowhere give municipalities like Greenburgh a license to tax only part of the town for the town's own costs for such facilities.

15. Finally, Respondents argue that this Court “acknowledged” in its Taxter Ridge ruling that there is an exclusive use exemption “for grant contract agreements entered into between the Town and the Federal government.” Fried Aff. ¶ 12. Respondents misconstrue the Court's ruling. The Court held that Chapter 891 had no application to costs associated with Taxter Ridge – a park open town-wide – because Chapter 891 applies only to parks, playgrounds and recreational facilities which are restricted in use to residents of the unincorporated areas. Even though Taxter Ridge did not involve any federal grants, Respondents tried to justify part-town taxation in that case based on the clause in Chapter 891 which states that the restriction in use requirement was to be “subject to any agreements between said town and the United States government contained in any grant contract.” Respondents' argument was that if Chapter 891 were read to permit part-town taxation for facilities which had to be open town-wide as a condition for receiving federal funds, then it should also be read to allow part-town taxation for parks that must likewise be open town-wide if such restriction-free use were required as a condition for receiving any money for such parks from New York State or Westchester County.

16. This Court, in rejecting Respondents' argument, held that “aside from the complete absence of any legal authority or legislative history supporting such an expansive interpretation of Chapter 891, such a reading would directly contravene the express terms of the statute.” Respondents also argued that in the alternative that deference should be given to their interpretation of the scope of Chapter 891's supposed “exemption” provisions on the ground that such interpretation was made in “good faith.” This Court rejected that position as “patently contrary to law.” In short, the suggestion that this Court “acknowledged” that Chapter 891 gave

Respondents the right to levy part-town taxation when federal funds were involved is belied by the decision itself which never addressed the issue.

17. Lastly, Respondents assert that in their reply affirmation that what they are seeking most of all is a “final appellate resolution as to the scope of Chapter 891.” Fried Reply Aff., ¶ 13. The best way for that to occur is not for this Court to stay the instant proceeding -- but to rule promptly on its merits so that the parties can appeal and hopefully get both this case -- and the Taxter Ridge case -- argued together. That is the surest way to obtain “final appellate resolution as to the scope of Chapter 891.”

WHEREFORE, for these reasons, and for the reasons set forth in the Verified Petition and in Petitioner’s Affirmation in Opposition to Respondents’ Motion for Stay, Petitioner respectfully requests that Respondents’ motion be denied in all respects and that the relief requested in the Verified Petition be granted in all respects.

Yours, etc.,

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Sworn to before me this 23d
day of May 2006

Notary Public

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AS PROPOSED INTERVENERS