

SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of
ROBERT B. BERNSTEIN

Petitioner,

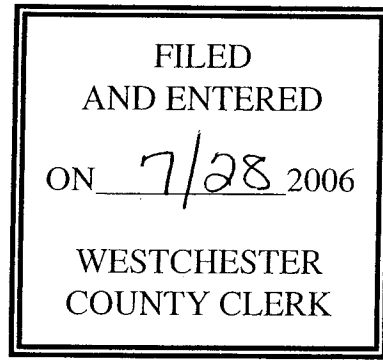
For the Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

-against-

PAUL FEINER, as Town Supervisor,
Town of Greenburgh, New York and
THE TOWN OF GREENBURGH,

Respondents,

-----X
CACACE, J.



Decision & Order
Index No.: 6807-06

This is a proceeding pursuant to Article 78 of the Civil Practice Law and Rules wherein petitioner seeks a judgment declaring the actions of the respondents adopting a budget that levies taxes only on assessable lands in the unincorporated part of the Town for costs of acquiring and maintaining parks to be in violation of state law and enjoining the respondents from continuing to levy taxes in accordance with this procedure.

The petitioner is a resident in the unincorporated area of Edgemont in the Town of Greenburgh. In December, 2005, the Town of Greenburgh adopted a budget for 2006 which provided for the expenses for the parks, playgrounds and recreational facilities of the town to be paid from the taxes levied from the lands in the unincorporated portions of the town.

The petitioner initiated this proceeding pursuant to Article 78 of the Civil Practice Law and Rules seeking to enjoin the town from enacting this budget. The petitioner argues that this action violates §§ 220 and 232 of the New York State Town law.

In 2003, the petitioner brought an Article 78 proceeding against the same respondents challenging a similar action by the town (Bernstein v. Feiner, Supreme Court, Westchester County, Index No. 10944/03). In a decision, order and judgement dated, filed and entered February 17, 2005, the Supreme Court (Molea, J.) held that the town's actions violated Town Law §232. The respondents appealed this decision to the Supreme Court, Appellate Division, Second Department. The matter has not yet been scheduled for argument.

The respondents now move for a stay of the instant proceeding pending a determination of the appeal of the earlier action. Although the respondents claim that the issues in the two matters are the same, they indicate that even if the earlier decision in the petitioner's favor were to be affirmed in the Appellate Division, they would not concede the validity of his arguments in the pending proceeding.

CPLR § 7805 reads, in part, "On the motion of any party or on its own initiative, the court may stay further proceedings, or the enforcement of any determination under review, upon terms including notice, security and payment of costs, except that the enforcement of an order or judgment granted by the appellate division in a proceeding under this article may be stayed only by order of the appellate division or the court of appeals."

As noted in the practice commentary, "In determining whether a request for a stay pursuant to CPLR 7805 should be granted, some courts have applied the same criteria that are used in assessing a motion for a preliminary injunction. For preliminary injunctive relief, the moving party must show: (1) a 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." Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR

C7805:1.

The Court does not find that the respondents have established that a stay should be granted at this time.

In an exercise of discretion, the petitioner's application for a stay is denied. The respondents are directed to submit answering papers to the petition by August 17, 2006.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
July 28, 2006



HON. SUSAN CACACE

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