

**FACSIMILE TRANSMISSION**

**Herbert Rosenberg**

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To:	James Edward Pelzer, Chief Clerk
Company:	Appellate Division, Second Department
Fax no.:	(718) 858-2446
From:	Herbert Rosenberg
Date:	November 23, 2004
Total pages:	7 (including cover)
Subject:	Bernstein v. Feiner, et al, Docket No.
Cc:	Town Attorney, Town of Greenburgh Robert B. Bernstein, Esq.

Dear Mr. Pelzer:

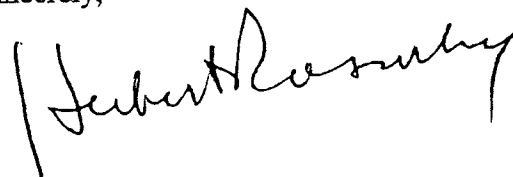
I am enclosing a letter (together with an exhibit) which is intended for the judges who have the cited matter under consideration (it was argued a couple of weeks ago).

As the letter makes clear, the matter under consideration is of enormous importance to the taxpayer-residents of the Town of Greenburgh (both the 40,000+ taxpayer-residents who live in the unincorporated area of the Town and the 40,000+ taxpayer-residents who live in the incorporated villages within the Town). The petitioner who commenced the proceeding, purports to represent the residents of the unincorporated area of the Town. The respondent is the Town of Greenburgh, which has no adverse interest in the matter. However, the parties who do have an interest adverse to the petitioner are the residents of the incorporated villages within the Town, and they have not been notified of the proceeding, did not appear, were not heard, and were not represented in any manner. They are, I believe, necessary parties to the proceeding.

I do not believe that the judges are aware of this fact, and it is important that they be aware, since their decision will have an enormous economic effect on those residents of the villages. The enclosed letter explains the context, and I think the judges will wish to know it.

Accordingly, I respectfully request that you transmit the letter to the judges who have this matter before them.

Sincerely,



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November 23, 2004

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Appellate Division of the Supreme Court  
Second Department  
45 Monroe Place  
Brooklyn, NY 11201

Bernstein v. Paul J. Feiner, et al  
Case No. 2003-10587

To The Honorable Court:

You have before you on appeal a decision in an Article 78 Proceeding entitled *Robert B. Bernstein v. Paul J. Feiner, as Town Supervisor, and Town of Greenburgh* (“the “Proceeding”), which was recently argued and is awaiting decision. I write this letter because I have only learned of the existence of the Proceeding this past weekend, and since it involves an issue of enormous political and economic impact on me, and more than 40,000 other persons – none of whom were represented in or informed of the pendency of the Proceeding – and time is of the essence, I must write this letter in place of a more formal intervention.

I am a property-owning resident of Dobbs Ferry, one of the six incorporated villages within the Town of Greenburgh in Westchester County. The Town of Greenburgh has a population in excess of 80,000 persons. More than 40,000 persons reside in the six incorporated villages and approximately 40,000 or more persons reside in the unincorporated area of the Town of Greenburgh. As you are surely aware, the incorporated villages are independent entities, with their own governments and infrastructure, provide their own services to their residents, levy their own taxes, and have only a marginal connection to the Town of Greenburgh, which provides minimal services to the villages. The unincorporated area of the Town, known as “Town Outside,” which consists of the entire Town less the six unincorporated villages, is governed by the Greenburgh Town Council and its Supervisor. The Town government provides infrastructure and services for the residents of the Town Outside, including providing and maintaining its parks.

The issue in the Proceeding is whether the cost of the acquisition of certain property which is located in the Town Outside area (the “acquisition cost”), used for town park purposes, should be charged to the taxpayers of the Town Outside (as has been done by the Greenburgh Town Council) or to the taxpayers of the entire Town, including the incorporated villages. The petitioner in the Proceeding, Robert B. Bernstein, a resident of the Town Outside, through an Article 78 proceeding, requests that the cost of the acquisition of Taxter Ridge, as well as the cost and maintenance of other parks in the Town Outside area, be charged to the taxpayers of the entire Town,

including the villages.<sup>1</sup> His petition has been dismissed by the Supreme Court on the grounds that Mr. Bernstein has no standing to bring the Proceeding. The direct issue before you is whether Mr. Bernstein does or does not have standing to bring the Proceeding. I believe that if Mr. Bernstein, representing the residents of the Town Outside, does have standing, then the residents of the villages must have standing, and opportunity, to contest the facts in the petition.

In that connection, Mr. Bernstein makes a number of material assertions which are not correct. However, because the Town moved to dismiss on the law, the factual issues were neither addressed nor tried. As just two examples:

(a) petitioner's assertion that village parks are restricted to village residents is untrue – village parks which have received funding from New York State and/or Westchester County are open to the general public and only parks which are funded exclusively by the villages can be restricted to village residents, which is exactly the case with Town of Greenburgh parks, and

(b) petitioner states that a \$6,000,000 shortfall in insurance coverage for a settlement of a negligence litigation involving a tree in the Town Outside area was planned to be charged to the entire Town and not just Town Outside taxpayers. While this was the initial determination, an opinion of the New York State Comptroller (copy attached) states that this should be a Town Outside cost, subject to the right of the Town Council to make appropriate apportionment if that is applicable. Thus the tree case supports the position that the Town can make the determination to allocate the cost for parkland to the area in which it exists.

This is not a simple issue, nor an issue with no disputed facts. It is, in fact, an issue involving numerous factual considerations, including locations, identification of town property, usages, the allocation of numerous other costs of services and ongoing maintenance on property of, or provided by, the Town government, the requirements of state law because of state funding, and many other related or analogous issues which time does not permit me to organize and present to you in this letter – though it is worth noting that parks in the villages which are open to the general public are paid for and maintained by the taxpayers of the respective villages and not by those of the Town Outside, even though those persons may have access to those parks by virtue of New York State contributions. Allocations of costs in the Town budget are complex, to put it mildly, but there is usually a reason and long history involved, including coordination with the villages.

I understand that Mr. Bernstein has argued not only that the lower court decision should be reversed because he does have standing, but that you should grant his petition on the merits because, he asserts, there are no facts in dispute. I strongly urge you to limit your decision to the standing issue. Aside from the many factual issues in this case, the residents of the six villages have not had the opportunity to be heard. They have not received notice of this Proceeding and have not been

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<sup>1</sup> New York State and Westchester County have contributed two-thirds of the cost of acquiring the Taxter Ridge property for park purposes, and New York State has contributed funds for the other parks referred to in the petition. For that reason, the parks are required to be open to the general public (not just Greenburgh residents), even though as a practical matter these parks are used by residents in close proximity – i.e., in the Town outside area. Of course residents of the villages, who pay New York State and Westchester County taxes thus share in the cost.

given a proper opportunity to participate, even though they are enormously affected by your decision. If Mr. Bernstein is to be heard, then the village residents should have the same opportunity.

The respondents in the Proceeding are the Town Supervisor, Paul J. Feiner, and the Town of Greenburgh. But neither one of these has any interest whatsoever in the outcome of the Proceeding. The Town will pay one-third of the acquisition cost and be reimbursed for it through taxes, and the Town will get those tax revenues whether the allocation is to the Town Outside or to the entire Town. If the decision to allocate the acquisition cost to the Town Outside resident-taxpayers is correct (and I believe it is) then they will have a certain tax obligation and the village resident-taxpayers will not have that obligation. If Mr. Bernstein's assertion is correct, the Town Outside resident-taxpayers will have their obligations reduced and the villages' resident-taxpayers will have an obligation that they do not currently have. Thus, the only parties who have an interest in this Proceeding are the resident-taxpayers of the Town Outside and the villages.

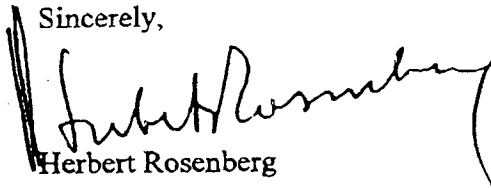
Mr. Bernstein purports to speak for the residents of the Town Outside, and it is for you to determine whether he has standing. But no one has spoken for the residents of the six incorporated villages. Mr. Bernstein has ignored them, and the Town did not speak for them either since the only issue before the lower court was one of standing – indeed, the Town is not affected by the outcome of this Proceeding other than to have defended its view of the law.

Having just learned of this Proceeding, I (and a number of persons to whom I spoke over the weekend) would wish to intervene and to present the numerous facts as evidence to support the decision made by the Greenburgh Town Council to allocate the acquisition cost to the Town Outside resident-taxpayers. We can do this if you remand the Proceeding to the trial court (assuming, of course, that you determine that Mr. Bernstein has standing).

Accordingly, I respectfully request that if you determine that Mr. Bernstein has standing to bring this Proceeding, you do not address the merits and instead remand the Proceeding to the trial court for further proceedings.

In the event that you wish to hear argument on this matter, I will be pleased to provide it. I will be leaving the country for a short trip on November 25 and I will return on December 1 and I can make myself available at any time thereafter.

Sincerely,



Herbert Rosenberg

cc: Town Attorney, Town of Greenburgh  
Robert B. Bernstein, Esq.

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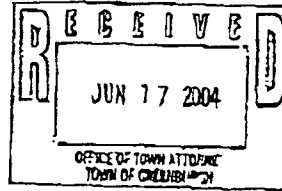
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ALAN G. HEVESI  
COMPTROLLER



STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

110 STATE STREET  
ALBANY, NEW YORK 12246



June 8, 2004

File No. 060438

Susan A. Mancuso, Esq.  
Town Attorney  
Town of Greenburgh  
Office of the Town Attorney  
177 Hillside Avenue  
Greenburgh, New York 10607

Dear Ms. Mancuso:

This is in response to your letter concerning the proper tax base to charge for the cost of a settlement of lawsuit against the town.

You indicate that a wrongful death and personal injury suit was commenced against the town based on a claim involving a tree, located in an undeveloped parkland area in the town approximately thirty feet from a state highway, that fell on a car occupied by the plaintiff and her husband. The tree was located in the area of the town outside of any village. The town moved for summary judgment. In upholding the lower court's denial of the town's motion, the Appellate Division, in Hillgard v Town of Greenburgh, 301 AD2d 572, 754 NYS2d 29, indicated that the town had a common-law duty to inspect "dangerous trees on their property or adjacent to their roadways." Noting that the plaintiff had submitted evidence that the town "had no program to inspect trees in passive parks where the tree that fell was located", the court also held that there was an issue of fact as to whether the town had constructive notice of the tree's decayed condition.

Following this decision, the case was scheduled for trial. The town and the plaintiff settled, however, prior to the trial. The town charged the full amount of the settlement to the town-wide general fund. You indicate that this decision was made on advice of the town attorney's office, based on the assumption that if the case were tried to a conclusion and a verdict rendered against the town, a jury would conclude that the town would have been "negligent for failing to implement a program to inspect trees on its property or adjacent to a state highway, and that such a determination would be attributable to the Town Board."

It has now been suggested that the cost should be charged instead to either park districts or the portion of the town's highway fund that is raised in the area of the town outside of villages. You ask whether it was proper for the town to charge the cost of this settlement on a town-wide basis.

Initially, I note that we generally render certain advisory legal opinions to supervisory local officials and municipal attorneys concerning the propriety, under general State laws, of prospective actions of the local government on whose behalf the opinion is requested. Accordingly, in our advisory opinions to local governments, we usually do not opine on the propriety of actions already taken by local officials. Nonetheless, in those instances when we do not render a formal advisory opinion, we do, whenever possible, refer to prior opinions, court cases or other materials that may be of assistance in addressing the issue at hand.

As noted in your letter, in our Opn No. 96-15, we set forth the analysis that a town should undertake in determining how to apportion amounts necessary to pay a judgment against the town that arises from the conduct of several town officials. The discussion in that opinion applies equally to acts and omissions in the case of a settlement.

In Opn No. 96-15, we first noted the general rule that all taxes for town purposes must be levied on the whole area of the town, unless the State Legislature has required or permitted any given expenditure to be paid from taxes levied on less than the entire area of the town (see also NY Const, art IX, §1(g)). In the case of judgments arising solely from functions that are charged upon the area of the town outside villages, the cost should be charged only to that area. In the case of a judgment or settlement arising out of the operation of a town improvement district, we have similarly concluded that the cost is an expense of maintenance of the district and is chargeable against the district (1986 Opns St Comp No. 86-43, p 71). If the town board determines that a judgment arises partially from town-wide functions and partially from part-town or district functions, the board should equitably apportion the costs.

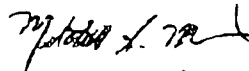
We noted in Opn No. 96-15 that this Office was not in a position to determine the extent to which the judgment at issue therein was attributable to actions of town officials taken in furtherance of part-town or town-wide functions. We instead indicated that it is the responsibility of the town board, upon review of the courts' decisions and with the advice of the town attorney, to make the initial apportionment. We would make a similar observation with respect to determining the actions that gave rise to the underlying cause of action in the case of a settlement.

It appears that the board here initially determined that it was its failure to implement a tree inspection program that gave rise to the claim, and that the inspection function was a comprehensive, town-wide activity. If the board has reason to question these initial determinations, it could reevaluate the facts and circumstances surrounding the settlement, and reassess whether there were other actions or omissions that contributed to the underlying claim.

For example, inasmuch as the Appellate Division specifically referenced the lack of a program to inspect trees in "passive parks", it is possible that the board could determine that an inspection function relating only to the operation and maintenance of town parks gave rise to the underlying cause of action. If so, then it would depend upon whether the parks were established on a town-wide basis (see, e.g., Town Law §220), a part-town basis (see General Municipal Law §240), in one or more park districts (see Town Law, articles 12, 12-A), or a combination of those alternatives (see, gen., Village of Ardley v Town of Greenburgh, 55 NY2d 915, 449 NYS2d 27).

The decision whether to review the prior determination and, if reviewed, whether the claim that gave rise to the settlement was related in whole or in part to other than a town-wide function, should be made by the town board.

Very truly yours,



Mitchell S. Morris  
Associate Counsel

MSM:

<sup>1</sup> We note that since the tree in question was proximate to a state, and not a town highway, it is not apparent that there is any factual basis on which to charge the town's highway fund (compare, e.g., 1990 Opus St Comp No. 90-10, p 23; 1989 Opus St Comp No. 89-21, p 45; 4 Opus St Comp, 1948, p 360; cf., Golda v Sunn, 248 AD2d 592, 670 NYS2d 524; Highway Law §45). As noted, however, the assessment of the surrounding facts and circumstances should be undertaken, in the first instance, by the town board, with advice of the town's legal counsel.